Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN L. "JACK" DADDONA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether an attorney's file memo containing his mental impressions and lay opinion of non-verbal conduct by a criminal defendant and which contradicts the attorney's own live testimony at trial that the defendant said and did nothing incriminating was properly admitted under F.R.E. 701?

II. Whether *McNally v. United States* requires reversal of a conviction for mail fraud and conspiracy to commit mail fraud where another trial court subsequently holds that the victim of the mail fraud (and the recipient of the allegedly false mailing denying a claim under a surety bond), who testified for the Government at trial, in fact, had no right to claim under the bond so that the victim could not have been deprived of anything of value within the meaning of 18 U.S.C. §1341?

III. Whether an unconstitutional denial of due process occurs where a trial court in a criminal case erroneously believes it has no subject matter jurisdiction to adjudicate a motion for new trial filed during the pendency of an appeal and, therefore, fails to reach the merits of the new trial motion so that the sufficiency of the new trial motion is never adjudicated and the conviction is affirmed?

IV. Whether court orders directing a criminal defendant not to file motions, denying a hearing on a new trial motion and denying requests for discovery amount to violations of the defendant's First, Fifth and Sixth Amendment rights?

LIST OF ALL PARTIES TO THE PROCEEDING

The United States and petitioner are the parties to this proceeding. Sidney Cohen, petitioner's co-defendant at trial, was party to the appeal below; but Cohen has not filed a petition for certiorari and his appeal has been remanded to the trial court for re-sentencing.

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OPINION BELOW

The opinion of the Court of Appeals below (Appendix 94, *infra*) is not reported. The opinions of the District Court below (Appendix 72a-93a, *infra*) are not reported.

GROUNDS OF THIS COURT'S JURISDICTION

The judgment of the Court below (Appendix 94a, *infra*) was entered on August 17, 1994. Rehearing was not sought. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The portions of the United States Constitution implicated by this Petition are the following:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The statutes under which Petitioner was prosecuted are the federal mail fraud statute and the federal conspiracy statute, which provide as follows:

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, place in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The admissibility of the so-called Leiderman Memo was governed by Federal Rule of Evidence 701, which provides:

> **Rule 701. Opinion Testimony by Lay Witnesses**
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

The issue of whether the Trial Court had subject matter jurisdiction to adjudicate the merits of Daddona's motion for new trial arises under Rule 33 of the Federal Rules of Criminal Procedure, which provides that:

> **Rule 33. New Trial**
>
> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment it entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after the final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

STATEMENT OF THE CASE

Daddona was indicted in the United States District Court for the Middle District of Pennsylvania on July 28, 1992.

The indictment (60a) alleged that Daddona conspired with his co-defendant, Sidney Cohen ("Cohen"), and one Daniel Culnen ("Culnen") to commit mail fraud and, furthermore, participated in two acts of mail fraud in connection with claims made on a performance bond and a labor and materials bond issued by Employers Insurance of Wausau. The claims arise out of the construction of an apartment house project in Harrisburg known as Green Hill Associates. Daddona's company, Eastern Consolidated Utilities ("ECU"), had been the replacement general contractor on the project.[1]

Cohen, the developer of Green Hill, was also charged in the same indictment with three additional offenses: conspiracy to transport a fraudulently obtained security in interstate commerce (Count I), interstate transportation of a fraudulently obtained security (Count II) and interstate transportation of a fraud victim (Count VI). (60a-71a).

The gist of the charges was that Daddona had conspired in 1987-88 with Culnen (his insurance agent) and Cohen (the developer of Green Hills) to deceive Employers Insurance of Wausau ("Wausau"), the obligor on the bonds, certain subcontractors on the Green Hills job and the project's lender into believing that the bonds were not validly issued when, in fact, they were. (Count III; 64a). Culnen, Wausau's agent, admitted furnishing false information to Wausau which became the basis for the two mailings by Wausau which were alleged as the basis of the mail fraud charges, *to wit*: two "denial of claim"

1. ECU, at the time of the events charged in the indictment, was a company which had over $3 million in net worth, contracts for work-in-process of over $15 million, jobs in three states and 250 employees. ECU lost $554,000 on the Green Hills project and is now in liquidation. Daddona, who, at the time these charges were brought, was a successful and prominent real estate developer, golf course owner and stone quarry operator, is now essentially un-bondable.

Daddona has had no previous contact with the justice system.

letters dated April 26, 1988 sent by Wausau to two subcontractors who had made claims under the labor and materials bond:

— John Meyers of Construction Management Corporation (69a; Count IV); and

— Leslie D. Stewart of York Excavating (70a; Count V).

Following a five-day trial on September 14-18, 1992, Daddona and Cohen were convicted. Proceedings to determine the amount of the "loss" caused by Daddona's fraud, as required by the Sentencing Guidelines, were held on March 30, and April 2, 1993. Daddona was sentenced to nine months incarceration on May 6, 1993.

On May 14, 1993, Daddona appealed the judgment of conviction and sentence. After Daddona's new trial motion was filed, the trial court issued an order on June 4, 1993, cancelling Daddona's sentencing date. (20a; Docket #121). Daddona remains free on bail.

On August 17, 1994, the Court of Appeals affirmed Daddona's conviction without discussion[2], but overturned his sentence.

By order dated September 23, 1994, upon Daddona's motion, the Court of Appeals stayed issuance of its mandate to permit this petition. (47a).

STATEMENT OF FACTS RELEVANT TO THIS PETITION

A. The Leiderman Memo

At trial, no direct evidence was offered by the Government of Daddona's participation in Culnen's admitted fraud.[3] One key piece of evidence offered by the Government was admitted over objection: a lawyer's file memo which recorded his mental impressions and lay opinion of a meeting with Daddona.

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2. The sole reference to Daddona's appeal of his conviction appears in footnote 12 of the opinion. (106a).

3. Culnen had previously pleaded guilty. The sentencing court found that he had acted alone. Every Government witness — including Culnen — testified at trial that Daddona never represented the Bonds were invalid.

The so-called Leiderman Memo, quoted in full below, was highly damaging to the defense. It said:

> On 3-17-88 MRL [Mitchell R. Leiderman] met with "Jack" Daddona of ECU. He, through innuendo, made accusations that the performance bond provided to Green Hill by ECU and then by Green Hill to Summit Tax Exempt Bond Fund was in some way not valid and was not obtained legitimately. He provided no proof and would not state this directly.

(120a).

Attorney Leiderman (the developer's lawyer) testified, however, that Daddona had made no incriminating statements to him. (115a-134a). In addition, the following exchange took place with the Court:

> Q What did Mr. Daddona say to you that made you infer that it was something about the bonds' validity?
>
> A He said nothing.
>
> THE COURT: The witness didn't say that he inferred it because of something Mr. Daddona said. He said he inferred it.
>
> THE WITNESS: That I inferred it.
>
> THE COURT: You inferred it but not based on what Mr. Daddona said?
>
> THE WITNESS: Exactly, Your Honor. (119a).

The Trial Court permitted the testimony.

B. The Alleged False Mailing to York Excavating

Subsequent to Daddona's conviction, another U.S. District Court issued a detailed opinion denying a claim made under the Wausau bond by one of Daddona's supposed victims. (154a). That District Court held that York Excavating, the sub-contractor who was the recipient of the false mailing charged in Count V, in fact, *had no legal right to claim under the bond.* (163a-168a). Therefore, York could not possibly have been defrauded by Daddona by means of the mailing charged in Count V.

Daddona's supposed wrongdoing did not result in a "deprivation of money or property" from York. Moreover, the testimony by York's president at Daddona's trial (135a-153a) that it had a contract with ECU, that York relied on the L&M Bond, and that York had been injured as a result fatally tainted the entire proceedings.

Thus, at a minimum, Daddona is entitled to an acquittal on that mail fraud count, and to a new trial on the other mail fraud count and the conspiracy count.

C. Daddona's "New Trial" Motions

On May 21, 1993, five days after taking his initial appeal in this case, Daddona filed a motion for new trial based on after-discovered evidence. (107a; Docket #114). The evidence upon which it was based was evidence which had come into Daddona's possession during the previous weeks.

Because of Daddona's unexpected sentence of incarceration, individuals who previously had been uncooperative with Daddona (including supposed victims and former witnesses for the Government) came forward to offer evidence suggesting the existence of material, exculpatory evidence and impeachment materials in the Government's possession. Daddona's efforts to place these matters before the Trial Court while his appeal was already underway resulted in complex procedural maneuvering and inconsistent rulings by the Trial Court and a Motions Panel of the Court of Appeals.

First, on June 3, 1993, Daddona motioned the Court of Appeals to remand this appeal in light of his new trial motion. Initially, the District Court ruled that it lacked jurisdiction to decide the new trial motion at all. (82a). On June 4, therefore, the District Court cancelled the reporting date for Daddona. Daddona continued his investigation and took several *ex parte* depositions.

These depositions showed that (a) exculpatory and impeachment materials had indeed been withheld; and (b) the Trial Court's subpoena power and an order to the U.S. Attorney for limited discovery were necessary to complete properly the record on Daddona's motion. On June 28, therefore, Daddona

filed a motion for leave to take discovery, to employ the subpoena power of the Court and to obtain certain limited discovery from the government. (22a; Docket #131).

He also requested a hearing. The Trial Court summarily denied that motion on July 1, before Daddona's brief and evidence in support of it had even been filed. (22a; Docket #132; 81a). The Trial Court also ruled—again—that it had no subject matter jurisdiction to decide the new trial motion. (82a). Daddona filed a timely motion to reconsider, with his brief and the transcripts on July 7. (22a; Docket #133). The trial court on July 7 then stayed consideration of that motion pending remand. (84a).

No remand occurred. On August 4, the Motions Panel of the Court of Appeals denied Daddona's motion to remand. Daddona immediately moved the Court of Appeals on August 7 to reconsider its denial of the remand motion. While that was pending, the Trial Court, sua sponte, ruled that it *did* have jurisdiction to decide the original new trial motion; and did so on September 23, 1993. (85a).

In the course of its opinion, the Trial Court stated:

> [X] was a key Government witness on the issue of loss caused by Defendant's fraud . . .
>
> * * *
>
> A prosecutor has the duty to make available to a defendant exculpatory evidence as well as evidence that might impeach a government witness . . . A failure to so notify a defendant violates due process and is cause for reversal of a conviction.
>
> * * *
>
> [W]hile we acknowledge that the Government had a duty to disclose to defendants any evidence that might have impeached [X], nothing in the two proffered statements indicates that the Government had any such knowledge.

(86a).

However, the Trial Court did not discuss any of the evidence attached to Daddona's brief in support of his motion for leave to take discovery which, in fact, dealt with this key witness. Moreover, the Trial Court denied, without discussion, Daddona's motion to reconsider its earlier ruling denying the motion for leave to take discovery. (85a). It did not discuss the evidence filed in the July 7 brief.

Three days later, the Court of Appeals again denied Daddona's motion to remand.

In light of the Trial Court's incomplete adjudication of the new trial motion, Daddona on October 15 filed a "renewed motion for new trial", attaching all of the previously overlooked evidence (already filed once with the Trial Court on July 7), together with one additional transcript. (24a; Docket #145). Daddona's brief showed how this evidence squarely met the standard announced by the Trial Court in its September 23 opinion.

Two days later, however, the Trial Court, again without waiting for the Government's brief, issued a three-page opinion and order summarily denying the "renewed motion" without discussing the merits of Daddona's submission. (91a). It also ordered Daddona to file no more motions. (*Id.*).

The final irony, perhaps, was the Motions Panel's disposition of a simple scheduling motion which Daddona had filed to consolidate his appeals and to stay briefing until a decision by the District Court on the "renewed motion for new trial." (42a). The Motions Panel of the Court of Appeals on October 27, 1993, granted the request for consolidation and a single briefing schedule; but it *denied* Daddona's motion to stay the appeal pending a decision by the District Court.

Instead, the Motions Panel said:

> The request to stay the appeals pending disposition by the district court of the motion for a new trial is denied. In the absence of a motion to remand, it appears the district court would lack jurisdiction. *See*,

e.g., *United States v. Davis*, 924 F.2d 501 (3d Cir. 1991).

(93a).

The *Davis* case was (a) the basis for Daddona's two motions for remand (which the Court of Appeals denied) and (b) the basis for the District Court's initial ruling that it lacked subject matter jurisdiction[4].

As of today, no court has adjudicated whether the evidence attached to Daddona's July 7, 1993 submission affords him a basis for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING THE LIEDERMAN MEMO.

At trial, the Government called Mitchell R. Liederman, Esquire, Cohen's former lawyer, to testify against Daddona. (115a-134a). He testified that he met with Daddona on March 17, 1988. After Liederman had testified that Daddona had engaged in no affirmative conduct suggesting that the bonds were invalid, the prosecutor showed him a copy of his own file memo.

The so-called Leiderman Memo may be characterized in several ways. Whatever characterization is used, however, it is plain that its admission was a gravely prejudicial error.

Preliminarily, the Liederman Memo legally constituted attorney-work product belonging to attorney Liederman. On March 17, 1988, Leiderman (attorney for the developer) was interviewing Daddona (the prime contractor) about a construction project on which the developer (Cohen) had defaulted on the project financing and was being sued by the lender,

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4. Interestingly, the Trial Court flip-flopped for a *second* time on January 12, 1994. There, the Trial Court found it had no jurisdiction to decide a motion by Cohen's counsel to withdraw as counsel because the appeal "divested [the court] of jurisdiction over virtually all proceedings," *citing*, *Venen v. Sweet*, 758 F.2d 117, 120 (3rd Cir. 1985).

all contractor work had stopped because of non-payment—although Daddona, the prime, was not in default, and two subcontractors had made bond claims.

Liederman's mental impressions as to Daddona's credibility as a witness (Daddona was then owed $554,000 by Leiderman's client and would soon sue Cohen) is classic attorney work-product. Moreover, there was ample testimony which should have alerted the Trial Court to the impropriety of the introduction of that evidence. Pretending that it was "opinion" or pretending that it memorialized a prior statement by Daddona is, to put it politely, disingenuous. So is the old stand-by: credibility is for the jury. How does defense counsel cross-examine the Liederman Memo?

Federal Rule of Evidence 701 provides that, if a witness is not testifying as an expert, the witness' testimony in the form of an opinion or an inference is limited to those opinions or references which are (a) rationally based on the perception of the witness or (b) helpful to a clear understanding of the witness' testimony on the determination of the fact at issue. Thus, the mental impressions of counsel are almost always inadmissible. *Schindler v. United States*, 221 F.2d 743 (9th Cir. 1955), *cert. denied*, 350 U.S. 938 (1956); *United States v. Guzzino*, 810 F.2d 687 (7th Cir. 1987), *cert. denied*, 481 U.S. 1030 (1988) ("[t]he relevant issue is not what a lawyer would think, but what the defendants understand").

This Court has not had occasion to construe F.R.E. 701. Trial courts routinely refuse to allow attorneys to testify as to anything other than facts. An attorney's lay opinion as to the intent, belief or feelings of the accused, or his manner, appearance or conduct—which is what the Liederman Memo contains—is something that must be avoided. *United States v. Chavis*, 772 F.2d 100 (5th Cir. 1985). "The conclusion or interpretation of a witness as to the meaning of what someone said is not admissible." *DeLoach v. United States*, 307 F.2d 653, 655 (D.C. Cir. 1962) (per Burger, J.). While arguably permitted under the language of F.R.E. 701, the great weight of authority is against such use. This Court should so hold.

The Third Circuit limits F.R.E. 701's application so as to permit lay opinion on what an accused meant or conveyed only to the instance where it is necessary to explain code words, or "code-like" (summary) remarks in recorded conversations. *United States v. Dicker*, 853 F.2d 1103, 1108-1110 (3d Cir. 1988). *See generally United States v. DePeri*, 778 F.2d 963 (3d Cir. 1985), *cert. denied sub nom., Murphy v. United States*, 757 U.S. 1110 (1986). Clear statements are not to be interpreted, *id.*; and here Liederman's testimony is that Daddona clearly said nothing about the validity of the bonds. (118a).

Another example is the case of *United States v. Cox*, 633 F.2d 871 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981). The *Cox* case was quoted by the Third Circuit, in *Dicker*, with approval, as follows:

> In that case, the defendant was convicted of possession of unregistered firearms, specifically pipe bombs. Witness Jeanette Carter responded to a question by the government by saying:
>
> > *He never actually said that*, you know, he had blown it up *but it was my understanding*, or by his mentioning that he had a friend and that when showed me the article that it was my impression when we were done talking that he was involved in having it blown up.
>
> The court, although it found the error harmless, declared that Carter's testimony should not have been admitted, because the witness' 'understanding' did not aid the triers of fact in their understanding of what the appellants had said and done. The jury could draw its own conclusions from what Carter had already testified. Her additional analysis was irrelevant and should not have been admitted.

853 F.2d at 1110, *citing*, 633 F.2d at 876 (emphasis added). *Accord, United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

The Trial Court's abuse of discretion is plain. (119a). As in *Dicker*, the Government's use of the Liederman Memo at trial and in its closing was so prejudicial to Daddona as to require reversal.[5] Without the Liederman Memo, the Government has no case against Daddona. A mail fraud conviction requires proof beyond a reasonable doubt that a false representation was made. *United States v. Regent Offices Supply Co.*, 421 F.2d 1174 (2d Cir. 1970). Nor does the statute create a duty to reveal material facts, unless the accused already had a legal duty to speak. *United States v. Chiarella*, 445 U.S. 220, 227, 100 S.Ct. 1100, 1114 (1980). The Liederman Memo is the only evidence which comes close to meeting that standard.

Unlike *Cox*, therefore, where there was "overwhelming" other evidence of guilt, here the appropriate disposition by the Court of Appeals should have been reversal of the conviction with directions to the Trial Court to enter a judgment of acquittal.

II. THIS COURT'S DECISION IN MCNALLY REQUIRES REVERSAL OF ONE COUNT OF DADDONA'S CONVICTION AND A NEW TRIAL ON THE OTHER COUNTS.

Another District Court has squarely held that York Contracting had no rights under the surety bond.

Yet, Count V of the indictment charged that Daddona committed mail fraud by causing Wausau's (we now know, *correct*) denial of York's claims. Even more to the point, York's president testified extensively at Daddona's trial about York's reliance on the L&M bond. (135a-153a). He even appears to have falsely testified that York had a contract with ECU—a complete falsehood. (139a).

In *McNally v. United States*, 483 U.S. 350, 107 S.Ct 2875 (1987), this Court held that, without a deprivation of rights, there cannot be a valid prosecution under the mail fraud statute.

5. This order, for example, prevented Daddona from moving for a new trial before the Trial Court on the basis of the October 21, 1993 decision in *York Excavating*!

Under federal law, fraud refers to wronging someone in his property rights by dishonest means or schemes. 18 U.S.C. § 1341.

The *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), the Third Circuit applied *McNally* to hold that pension fund trustees who received kickbacks for making illegal investments of pension fund moneys were not guilty of mail fraud under federal law. In *United States v. Johns*, 742 F. Supp 196 (E.D. Pa. 1990), the Court ruled the defendants could not be held guilty of mail fraud where brokers and vendors overcharged the defendants' employers and the overcharge lined the defendants' pockets.

These principles are squarely implicated by the other District Court's ruling that York, the subcontractor who received the mailing charged in Count V, had no legal right to claim under the L&M bond. Thus, York was not deprived of any "money or property." by Daddona's conduct. Daddona is thus entitled to an acquittal on Count V.

This is because there is no way the result of this trial can be purged of the effect of the Government's erroneous inclusion of Count V in the indictment or its calling of York as a witness. The only remedy is to reverse the convictions on Count V and a new trial on the remaining charges.

III. THE INCONSISTENT RULINGS BY THE COURTS BELOW ON THE ISSUE OF JURISDICTION ON DADDONA'S NEW TRIAL MOTIONS, THE DENIAL OF HIS REQUESTS FOR USE OF THE COURT'S SUBPOENA POWER AND THE ORDERS PROHIBITING HIM FROM FILING MOTIONS VIOLATED DADDONA'S RIGHT TO DUE PROCESS OF LAW AND HIS FIRST AND SIXTH AMENDMENT RIGHTS.

The lower courts' treatment of Daddona's new trial motion is unsatisfactory to any advocate of judicial consistency or the orderly administration of justice. The Trial Court ruled on June 4, 1993 that it had no jurisdiction; said the same thing on July 7; then on September 23, the Trial Court ruled it *did* have jurisdiction; on October 17, it again ruled it had jurisdiction

and ordered Daddona to file no more motions; and then on January 27, 1994, the Trial Court ruled it had no jurisdiction. A Motions Panel of the Court of Appeals denied Daddona's motion to remand three times, then issued an order pointing out the need for a remand. (93a).

As a result, no court ever actually came to grips with Daddona's new trial motion. The constitutional effect of this is that, as a result of inconsistent rulings on the jurisdiction issue, the sufficiency of Daddona's new trial motion has never been adjudicated on the merits.

Admittedly, there appears to be some confusion among the commentators as to whether a trial court may decide a new trial motion while an appeal is pending. *See* 58 Am. Jur. 2d, *New Trial*, §17 (1978 & 1993 Supp.); 3 C. Wright, A. Miller & M. Kane, *Federal Prac. & Proc.* §558, 559 (1982 & 1994 Supp.).

However, the Trial Court's failure to reach the merits[6] is inexplicable in light of this Court's precedent in *United States v. Cronic*, 466 U.S. 648 (1984). There, this Court said:

> [A] District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case.

466 U.S. 648, 667, n. 42.

Petitioner, accordingly, motioned the Court of Appeals for a remand. The Trial Court, meanwhile, twice ruled it had no jurisdiction. Then, advised of *Chronic*, it denied the original motion; but it did not reach the merits of the evidence submitted on July 7. When Petitioner re-submitted that evidence on October 15, the Trial Court summarily denied the motion and ordered Petitioner to file no more motions.

---

6. In its October 19, 1993 opinion summarily denying Daddona's "renewed motion for new trial," the Trial Court said the motion was untimely. (92a). To the contrary, the evidence was submitted within days of its receipt. And the original motion was filed on June 28, 1993 - before the transcripts were received, as permitted by the Local Rules of the District. (22a; Docket #131).

Daddona need make only a brief argument to show that the record of post-trial proceedings below amounted to a denial of Daddona's Fifth Amendment right to due process and his First and Sixth Amendment rights of access to the courts, to the use of the trial court's subpoena power to compel attendance of witnesses and production of documents containing evidence favorable to him. The orders not to file motions, in particular, implicate the First Amendment.

Specifically, the Trial Court:

1. quashed subpoenas served on parties having evidence favorable to Daddona (15a; Docket #88);

2. ordered Daddona not to file any more motions before sentencing (*Id.*);

3. ordered Daddona not to file any more motions until the Court of Appeals had ruled on his appeal (24a; Docket #148; 92a);

4. denied Daddona the use of compulsory process to pursue the witnesses and develop issues uncovered by his post-trial investigation (22a; Docket #172);

5. denied Daddona's request for discovery from the government (22a; Docket #132); and

6. denied Daddona's request for a hearing on his new trial motion (*Id.*).

Perhaps even more to the point, Daddona's new trial motion has yet to be adjudicated on the merits. Since the Court of Appeals simply affirmed the Trial Court's denial of the new trial motion without appraising the merits of the evidence submitted in support of it, *no court* has looked at the newly-discovered evidence offered by Daddona on July 7, 1993, to show that his conviction was erroneous.

For these constitutional reasons, as well, Daddona's petition should be granted.

CONCLUSION

WHEREFORE, upon the facts, reasoning and authorities set forth above, Daddona's petition for issuance of a writ of certiorari should be granted.

Respectfully submitted,

NANCY O'MARA EZOLD
225 W. Germantown Pike
Plymouth Meeting,PA 19460
(610) 941-4040

Attorney for Petitioner
John L. "Jack" Daddona

DATED: October 13, 1994

OF COUNSEL:

James G. Wiles, Esquire
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(215) 854-6360

CERTIFICATE OF SERVICE

I hereby certify that I today served three (3) copies of the foregoing paper upon all counsel and upon the Solicitor General of the United States, by mailing said copies via first class mail, postage prepaid, to the following:

Solicitor General
Department of Justice
Washington, DC 20530

Kim Daniel, Esquire
Assistant United States Attorney
United States Courthouse
228 Walnut Street
Harrisburg, PA 17108

JAMES G. WILES

DATED: October 13, 1994

Supreme Court, U.S.
FILED

94 678 OCT 14 1994

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN L. "JACK" DADDONA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NANCY O'MARA EZOLD
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DATED: October 13, 1994

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TERMED APPEAL

U.S. District Court
Middle District of Pennsylvania (Harrisburg)

CRIMINAL DOCKET FOR CASE #: 92-CR-179-ALL

USA v. Cohen, et al
Dkt# in other court: None

Filed: 07/28/92

Case Assigned to: Judge William W Caldwell

SIDNEY COHEN (1)

Sidney Cohen
[COR LD NTC] [PRO SE]
8208 New Second Street
Elkins Park, PA 19117

Francis Recchuiti
[COR LD NTC ret]
319 Swede St.
Norristown, PA 19401
215-279-4200

Pending Counts:	Disposition
18:2314 TRANSPORT, FORGED SECURITIES (2)	Special assessments $50 per count, total $200; imprisonment 9 months on each count to run concurrently; supervised release 2 years on each count to run concurrently. (2)
18:371 CONSPIRACY TO COMMIT MAIL FRAUD (RE: 18:1341) (3)	Special assessments $50 per count, total $200; imprisonment 9 months on each count to run concurrently; supervised release 2 years on each count to run concurrently. (3)

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18:1341 & 2, MAIL FRAUD, AID & ABET (4-5)	Special assessments $50 per count, total $200; imprisonment 9 months on each count to run concurrently; supervised release 2 years on each count to run concurrently. (4-5)

Offense Level (opening): 4

Terminated Counts:	Disposition
18:371 CONSPIRACY TO TRANSPORT FRAUDULENT SECURITY IN INTERSTATE COMMERCE (RE: 18:2314) (1)	Acquitted by Jury (1)
18:2314 & 2 INTERSTATE TRANSPORTATION OF FRAUD VICTIM; AID & ABET (6)	Count 6 dismissed on dft motion as to dft Sidney Cohen. (6)

Offense Level (disposition): 4

Complaints:

NONE

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Case Assigned to: Judge William W Caldwell

JOHN DADDONA (2)

James L. Heidecker, Jr.
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John Daddona
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James G. Wiles
[COR LD NTC ret]
James G. Wiles
[term 10/06/93]
(See above)
[COR LD NTC ret]
1411 Walnut Street
Suite 200
Philadelphia, PA 19102
215/563-3622

Pending Counts:	Disposition
18:371 CONSPIRACY TO COMMIT MAIL FRAUD (RE: 18: 1341) (3)	Special assessments $50 per count, total $150; imprisonment 9 months each count to run concurrently; supervised release 2 years each count to run concurrently. (3)

Proceedings include all events. TERMED
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18:1341 & 2 MAIL FRAUD; AID & ABET (4-5)	Special assessments $50 per count, total $150; imprisonment 9 months each count to run concurrently; supervised release 2 years each count to run concurrently. (4-5)

Offense Level (opening): 4

Termination Counts:

NONE

Complaints:

NONE

U. S. Attorneys:

Kim Douglas Daniel
[COR LD NTC]
U.S. Attorney's Office
P.O. Box 11754
Harrisburg, PA 17108
717-782-4482

Proceedings include all events. TERMED
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7/28/92	1	INDICTMENT by USA Kim Douglas Daniel. Counts filed against Sidney Cohen (1) count(s) 1, 2, 3, 4-5, John Daddona (2) count(s) 3, 4-5 (cc: Ct, dft, USA, counsel, USM, USP) (pr) [Entry date 07/31/92]
7/28/92	2	ORDER by Judge Sylvia H. Rambo warrant issued for Sidney Cohen (cc: Ct, dft, USA, counsel, USM, USP) (pr) [Entry date 07/31/92]
7/28/92	3	ORDER by Judge Sylvia H. Rambo warrant issued for John Daddona (cc: Ct, dft, USA, counsel, USM, USP) (pr) [Entry date 07/31/92]
7/29/92	—	ARREST Warrant issued for Sidney Cohen. Orig + 2 to USM, cc: Ct, USA, Prob, Dft via USM, Cnsl. (pr) [Entry date 07/31/92]
7/29/92	—	ARREST Warrant issued for John Daddona. Orig + 2 to USM, cc: Ct, USA, Prob, Dft via USM, Cnsl. (pr) [Entry date 07/31/92]
7/31/92	—	REMARK: copy dkt to Judge Caldwell. (pr) [Entry date 07/31/92]
8/3/92	4	MINUTE SHEET: first appearance of Sidney Cohen on R/5 & arraignment; Attorney Francis Recchuiti present;, dft Sidney Cohen arraigned; not guilty plea entered; J/S set 9/14/92. V. Fox, RPR. (pr) [Entry date 08/14/92]
8/3/92	5	APPEARANCE of Attorney for Sidney Cohen by Francis Recchuiti. (pr) [Entry date 08/14/92]
8/3/92	6	ORDER by Magistrate J. A. Smyser setting conditions of release for Sidney Cohen: dft shall execute unsecured bond amt $30,000; released after processing. cc: Ct, USA, USM, Prob, Dft, Cnsl. (pr) [Entry date 08/14/92]

Proceedings include all events. TERMED
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8/3/92	7	APPEARANCE BOND ($30,000 unsecured) executed by Sidney Cohen. cc: Ct, USA, USM, Prob, Dft Cnsl. (pr) [Entry date 08/14/92]
8/3/92	8	ORDER by Judge William W. Caldwell jury trial set 9/14/92, 9:30 for dft Cohen (cc: Ct, Ct. Rptr, Ct. Dpty, dft, USA, counsel, USM, USP) (pr) [Entry date 08/14/92]
8/4/92	9	SPECIAL Admissions Form (approved) for Sidney Cohen by Atty Recchuiti. cc: Scr. Registry, Atty. (pr) [Entry date 08/14/92]
8/11/92	10	MINUTE SHEET: first appearance of John Daddona on rule 5/arraignment; Attorney James L. Heidecker Jr. present; dft John Daddona arraigned; not guilty plea entered; j/s set 9/14/92. M. Zamiska, RPR. (pr) [Entry date 08/14/92]
8/11/92	11	APPEARANCE of Attorney for John Daddona by Atty Heidecker. (pr) [Entry date 08/14/92]
8/11/92	12	ORDER by Judge William W. Caldwell setting conditions of release for John Daddona: dft to execute unsecured bond amt $30,000; released after processing. cc: Ct, USA, USM, Prob, Dft, Cnsl. (pr) [Entry date 08/14/92]
8/11/92	13	APPEARANCE BOND ($30,000 unsecured) executed by John Daddona. cc: Ct, USA, USM, Prob, Dft, Cnsl. (pr) [Entry date 08/14/92]
8/11/92	14	ORDER by Judge William W. Caldwell jury trial set 9/14/92, 9:30 for dft Daddona. (cc: dft, USA, counsel, Ct, Ct. Rptr, USM, USP) (pr) [Entry date 08/14/92]
8/18/92	15	ARREST Warrant returned as to John Daddona 8/11/92 (pr) [Entry date 08/18/92]
8/18/92	16	ARREST Warrant returned as to Sidney Cohen 8/3/92 (pr) [Entry date 08/18/92]

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9/11/92	17	PROPOSED Jury Instructions by plaintiff USA (pr) [Entry date 09/15/92]
9/14/92	18	MINUTE SHEET: Prospective jurors sworn; 26 called; 12 peremptory challenges; 14 selected & sworn. Trial begins; Openings made; govt calls witness. Court adjourned until 9:00, 9/15/92. M. Zamiska, RPR. (pr) [Entry date 09/15/92]
9/14/92	19	JURY List (pr) [Entry date 09/15/92]
9/14/92	20	SPECIAL Admissions Form (approved) James Heidecker for John Daddona by Judge Caldwell. cc: Scranton Registry, Atty. (pr) [Entry date 09/15/92]
9/15/92	21	MINUTE SHEET: 2nd day of trial. Dfts present w/cnsl. Govt witnesses continue. Court adjourned until 9:00 9/15/92. M. Zamiska, RPR. (pr) [Entry date 09/16/92]
9/16/92	22	MINUTE SHEET: 3rd day of trial. Govt witnesses continue. Govt rests. Dfts move for dismissal of all counts; denied with respect to all counts except count 6 which is taken under advisement. Govt request to maintain custody of govt exhibits until tomorrow granted. Ct. adjourned until 9:00 9/17/92. M. Zamiska, RPR. (pr) [Entry date 09/17/92]
9/17/92	23	ORDER by Judge William W. Caldwell dismissing counts as to Sidney Cohen (1) count(s) 6. (cc: dft, Ct, Security, USA, counsel, USM, USP) (pr) [Entry date 09/17/92]
9/17/92	24	MINUTE SHEET: 4th day of trial. Defense case begins and ends. Court adjourned until 9/18/92, 9:00. M. Zamiska, RPR. (pr) [Entry date 09/18/92]

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9/18/92	25	MINUTE SHEET: 5th day of trial. Defense rests & moves exhibits into record. Add'l govt exhibits moved into record. Closing arguments made. Jury charged & retires to deliberate @ 1:15 p.m. Verdicts ret'd @ 9:10 p.m. finding Sidney Cohen guilty count(s) 2, 3, 4-5, finding Sidney Cohen not guilty Count 1, finding John Daddona guilty count(s) 3, 4-5. Jury released. Bail cont'd. M. Zamiska, RPR. (pr) [Entry date 09/21/92]
9/18/92	26	JURY QUESTION #1. (pr) [Entry date 09/21/92]
9/18/92	27	VERDICT of jury Sidney Cohen found not guilty Count 1, guilty Counts 2-5, John Daddona found guilty Counts 3-5. (pr) [Entry date 09/21/92]
9/18/92	28	EXHIBIT list by plaintiff USA (pr) [Entry date 10/05/92] [Edit date 10/05/92]
9/18/92	29	EXHIBIT list by defendant Sidney Cohen (pr) [Entry date 10/05/92] [Edit date 10/05/92]
9/18/92	30	EXHIBIT list by defendant John Daddona (pr) [Entry date 10/05/92]
9/21/92	31	LETTER from Clerk to counsel enclosing exhibits & requesting acknowledgment of receipt for same. (pr) [Entry date 10/05/92]
9/21/92	32	RECEIPT filed by plaintiff USA for exhibits. (pr) [Entry date 10/05/92]
9/21/92	33	ORDER by Judge William W. Caldwell Clerk to pay sum of $134.95 to Gazebo Room for supper for 12 jurors & 1 bailiff during deliberations 9/18/92. (cc: dft, USA, counsel, USM, USP) (pr) [Entry date 10/05/92]
9/24/92	34	RECEIPT filed by defendant Sidney Cohen's cnsl Recchuiti acknowledging receipt for exhibits. (pr) [Entry date 10/05/92]

Proceedings include all events. TERMED
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9/25/92	35	MOTION for new trial defendant Sidney Cohen, for judgment of acquittal by defendant Sidney Cohen (pr) [Entry date 10/05/92]
9/25/92	36	MOTION for decision of motions w/transcript of testimony & for deferring of briefing schedule by defendant Sidney Cohen (pr) [Entry date 10/05/92]
9/25/92	37	BRIEF/MEMORANDUM by defendant Sidney Cohen in support of motion for decision of motions w/transcript of testimony & for deferring of briefing schedule by defendant Sidney Cohen [36-1] (pr) [Entry date 10/05/92]
9/25/92	38	MOTION to set aside verdict by John Daddona (pr) [Entry date 10/05/92]
9/29/92	39	ORDER by Judge William W. Caldwell granting motion for decision of motions w/transcript of testimony & for deferring of briefing schedule by defendant Sidney Cohen [36-1] 1) Each dft shall deposit sum of $1,000 with M. Zamiska, Ct. Rptr, w/in 7 days hereof. 2) Upon receipt of said deposits the testimony & closing arguments shall be transcribed by M. Zamiska. 3) Dfts shall share total cost for orig. & 1 copy of said transcript. 4) Briefs in support of each dfts motions shall be filed w/in 30 days of the filing of the trial transcript. (cc: dft, USA, counsel.) (pr) [Entry date 10/05/92]
9/30/92	40	VOUCHER #6721293158 showing $62.68 paid to Dee & Deb's for lunch for jury 9/18/92, chk #112343 9/30/92. (pr) [Entry date 10/05/92]
9/30/92	41	VOUCHER #6721293153 showing $134.95 pd to Gazebo Room for dinner for jury 9/18/92, chk #112335 pd 9/28/92. (pr) [Entry date 10/05/92]

Proceedings include all events. TERMED
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10/6/92	42	MOTION for new trial based on newly discovered evidence by defendant Sidney Cohen (pr) [Entry date 10/08/92]
10/6/92	43	BRIEF/MEMORANDUM by defendant Sidney Cohen in support of motion for new trial based on newly discovered evidence by defendant Sidney Cohen [42-1] (pr) [Entry date 10/08/92]
10/13/92	44	MOTION for new trial based on newly discovered evidence by defendant John Daddona (cl) [Entry date 10/13/92]
10/13/92	45	MEMORANDUM OF LAW by defendant John Daddona IN SUPPORT of motion for new trial based on newly discovered evidence by defendant John Daddona [44-1] (cl) [Entry date 10/13/92]
10/22/92	46	RESPONSE by plaintiff USA to dft Cohen motion for new trial [44-1], to dft Daddonna motion for new trial. [42-1] (pr) [Entry date 10/23/92]
10/29/92	47	TRANSCRIPT of jury trial, vol. 1 held on 9/14-16/92, CTR: M. Zamiska (pr) [Entry date 10/30/92]
10/29/92	48	TRANSCRIPT of jury trial, vol. 2 held on 9/17-18/92, CTR: M. Zamiska (pr) [Entry date 10/30/92]
11/4/92	49	REPLY MEMORANDUM by defendant Sidney Cohen to motion for new trial based on newly discovered evidence by defendant Cohen [42-1] (cl) [Entry date 11/10/92]
11/4/92	50	AFFIDAVIT of Francis Recchuiti by defendant Sidney Cohen re [49-1] (cl) [Entry date 11/10/92]
11/30/92	51	BRIEF/MEMORANDUM by defendant Sidney Cohen in support of motions for new trial [35-1] and judgment of acquittal [35-2] (jh) [Entry date 12/02/92]

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12/15/92	52	OMNIBUS RESPONSE by plaintiff USA to [44-1], to [42-1], to [35-1] dfts motions for new trial (pr) [Entry date 12/17/92]
1/5/93	53	MOTION for leave to file late brief by defendant John Daddona (pr) [Entry date 01/05/93]
1/8/93	54	BRIEF/MEMORANDUM by defendant John Daddona in support of motion for new trial based on newly discovered evidence by defendant John Daddona [44-1], motion to set aside verdict by John Daddona [38-1] (pr) [Entry date 01/08/93]
1/13/93	55	RESPONSE by plaintiff USA to [53-1] (dft Daddona motion for late filing) (pr) [Entry date 01/14/93]
1/15/93	56	ORDER by Judge William W. Caldwell denying motion for leave to file late brief by defendant John Daddona [53-1] (cc: dft, USA, counsel, Court) (pr) [Entry date 01/15/93]
1/25/93	57	MEMORANDUM by Judge William W. Caldwell re: dfts' post trial motions. See Order. (cc: dft, USA, Security, counsel, USM, USP, Court) (pr) [Entry date 01/25/93]
1/25/93	57	ORDER by Judge William W. Caldwell denying motion for new trial based on newly discovered evidence by defendant John Daddona [44-1] denying motion for new trial based on newly discovered evidence by defendant Sidney Cohen [42-1] denying motion for new trial by defendant Sidney Cohen (35-1) denying motion for judgment of acquittal by defendant Sidney Cohen [35-2] (cc: dft, USA, Security, counsel, USM, USP, Court) (pr) [Entry date 01/25/93] [Edit date 01/25/93]

Proceedings include all events. TERMED
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2/17/93	58	NOTICE OF COURT sentencing set 3/2/93, 1:30, dft Cohen (cc: dft (reg/cert mail), USA, counsel, USM, USP, Crt Reporter, Court) (pr) [Entry date 02/18/93] [Edit date 02/18/93]
2/17/93	59	NOTICE OF COURT sentencing set 3/4/93, 1:30, dft Daddona (cc: dft (reg/cert mail), USA, counsel, USM, USP, Crt Reporter, Court) (pr) [Entry date 02/18/93] [Edit date 02/18/93]
2/22/93	60	MOTION to continue sentencing by defendant John Daddona (pr) [Entry date 02/22/93]
2/22/93	61	MOTION to supplement the record by USA (pr) [Entry date 02/22/93]
2/22/93	62	BRIEF/MEMORANDUM by plaintiff USA in support of motion to supplement the record by USA [61-1] (pr) [Entry date 02/22/93]
3/1/93	63	MOTION to continue sentencing by defendant Sidney Cohen (pr) [Entry date 03/02/93]
3/2/93	64	ORDER by Judge William W. Caldwell granting motion to supplement the record by USA [61-1]; testimony & exhibits introduced by govt during 6/15/92 sentencing hrg in case of U.S. v. Culnen (1:CR-91-105-01), is incorporated herein as part of the record in the above-captioned cases. (cc: dft, USA, counsel, Court) (pr) [Entry date 03/03/93]
3/2/93	65	ORDER by Judge William W. Caldwell granting motion to continue sentencing by defendant Sidney Cohen [63-1], granting motion to continue sentencing by defendant John Daddona [60-1] sentencing hearing and sentencing reset to 3/30/93, 9:30. Should the Court's March trial schedule require a postponement, the pro-

		ceeding shall be held 4/2/93, 9:30 & notice will be given before 3/26/93. (cc: Ct. Rptr, Ct. Dpty, dft, USA, counsel, USM, USP, Court) (pr) [Entry date 03/04/93]
3/8/93	66	BRIEF/MEMORANDUM by defendant Sidney Cohen in opposition of govt motion to supplement the record. (pr) [Entry date 03/08/93]
3/9/93	67	ORDER by Judge William W. Caldwell vacating [64-1] order of 3/2/93 incorporating testimony & exhibits introduced by govt in USA v. Culnen; govt may respond to memorandum filed by dft Sidney Cohen. (cc: dft, USA, counsel, Court) (pr) [Entry date 03/10/93]
3/10/93	68	MOTION to incorporate by reference attached notes of testimony @ sentencing hrg. by defendant John Daddona (pr) [Entry date 03/11/93]
3/10/93	69	MOTION to sever sentencing by defendant John Daddona (pr) [Entry date 03/11/93]
3/10/93	70	MOTION to incorporate by reference attached notes of attached testimony of A. Shahinian & J. King by defendant John Daddona (pr) [Entry date 03/11/93]
3/11/93	71	REPLY by plaintiff USA re [61-1] motion to supplement the record. (pr) [Entry date 03/12/93]
3/17/93	72	ORDER by Judge William W. Caldwell granting motion to supplement the record by USA [61-1] (cc: dft, USA, counsel, Court) (pr) [Entry date 03/18/93]
3/19/93	73	MOTION to incorporate by reference notes of testimony of J. Meyers & R. Yingling by defendant John Daddona (pr) [Entry date 03/24/93]

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3/22/93	74	MOTION for finding of contempt purs to FRCrP 1 7 by defendant John Daddona (pr) [Entry date 03/24/93]
3/22/93	76	MOTION for finding of contempt re: Liberty Contracting by defendant John Daddona (pr) [Entry date 03/25/93]
3/22/93	77	MOTION for finding of contempt re: Liberty Contracting by defendant John Daddona (pr) [Entry date 03/25/93]
3/22/93	78	MOTION for finding of contempt re: Summit Tax Exempt Bond Fund by defendant John Daddona (pr) [Entry date 03/25/93]
3/22/93	79	MOTION for of [sic] contempt re: The Related Companies by defendant John Daddona (pr) [Entry date 03/25/93]
3/22/93	80	MOTION for finding of contempt re: Pepper, Hamilton & Sheetz by defendant John Daddona (pr) [Entry date 03/25/93]
3/22/93	81	MOTION for finding of contempt re: RHA Investors by defendant John Daddona (pr) [Entry date 03/25/93]
3/22/93	82	MOTION for finding of contempt re: Norman Tandy Assoc. by defendant John Daddona (pr) [Entry date 03/25/93]
3/22/93	83	MOTION for finding of contempt re: Global Mgmt. by defendant John Daddona (pr) [Entry date 03/25/93]
3/23/93	75	ORDER by Judge William W. Caldwell denying motion to sever sentencing by defendant John Daddona [69-1] (cc: dft, USA, counsel, Court) (pr) [Entry date 03/24/93]
3/23/93	85	BRIEF/MEMORANDUM by plaintiff USA in opposition of motion to sever sentencing (pr) [Entry date 03/29/93]

Proceedings include all events. TERMED
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3/24/93	84	MOTION to continue by defendant John Daddona (pr) [Entry date 03/25/93]
3/24/93	86	BRIEF/MEMORANDUM by plaintiff USA in opposition of motion for finding of contempt re: Global Mgmt. by defendant John Daddona [83-1], motion for finding of contempt re: Norman Tandy Assoc. by defendant John Daddona [82-1], motion for finding of contempt re: RHA Investors by defendant John Daddona [81-1], motion for finding of contempt re: Pepper, Hamilton & Sheetz by defendant John Daddona [80-1], motion for of contempt re: The Related Companies by defendant John Daddona [79-1], motion for finding of contempt re: Summit Tax Exempt Bond Fund by defendant John Daddona [78-1], motion for finding of contempt re: Liberty Contracting by defendant John Daddona [77-1], motion for finding of contempt re: Liberty Contracting by defendant John Daddona [76-1], motion for finding of contempt purs to FRCrP 1 7 by defendant John Daddona [74-1] (pr) [Entry date 03/29/93]
3/25/93	87	BRIEF/MEMORANDUM by plaintiff USA in opposition of motion to continue by defendant John Daddona [84-1] (pr) [Entry date 03/29/93]
3/25/93	88	ORDER by Judge William W. Caldwell denying motion to continue by defendant John Daddona [84-1] denying motion for finding of contempt re: Global Mgmt. by defendant John Daddona [83-1] denying motion for finding of contempt re: Norman Tandy Assoc. by defendant John Daddona [82-1] denying motion for finding of contempt re: RHA Investors by defendant John Daddona [81-1] denying motion for finding of contempt re: Pepper, Hamilton & Sheetz by

		defendant John Daddona [80-1] denying motion for of [sic] contempt re: The Related Companies by defendant John Daddona [79-1] denying motion for finding of contempt re: Summit Tax Exempt Bond Fund by defendant John Daddona [78-1] denying motion for finding of contempt re: Liberty Contracting by defendant John Daddona [77-1] denying motion for finding of contempt re: Liberty Contracting by defendant John Daddona [76-1] denying motion for finding of contempt purs to FRCrP 1 7 by defendant John Daddona [74-1]; no further motions or petitions shall be filed pending sentencing hrg 3/30/93. (cc: dft, USA, counsel, Court) (pr) [Entry date 03/29/93]
3/26/93	89	SENTENCING memorandum of govt re Sidney Cohen, John Daddona (pr) [Entry date 03/29/93]
3/30/93	90	MINUTE SHEET: sentencing hearing held. Dfts present w/cnsl; witnesses called/exhibits introduced; parties rest & sentence to be imposed later this week. CTR: M. Zamiska (pr) [Entry date 03/31/93]
4/2/93	91	MINUTE SHEET: Sentencing hrg. Argument heard re: loss; court takes under advisement and sentences are not imposed this date. CTR: none (pr) [Entry date 04/02/93]
4/2/93	92	EXHIBIT list by defendant Sidney Cohen (pr) [Entry date 04/02/93]
4/2/93	93	EXHIBIT list by defendant John Daddona (pr) [Entry date 04/02/93]
4/13/93	94	MEMORANDUM by Judge William W. Caldwell re: guideline calculations. Court's analysis results in an offense level of 15 for both dfts & sentencing will proceed on this basis.

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		(cc: dft, USA, counsel, USM, USP, Court) (pr) [Entry date 04/14/93]
4/13/93	94	ORDER by Judge William W. Caldwell sentencing set 4/22/93, 10:00, Daddona, sentencing set 4/22/93, 11:00, Cohen (cc: Ct. Rptr, Ct. Dpty, dft, USA, counsel, USM, USP, Court) (pr) [Entry date 04/14/93]
4/16/93	95	ORDER by Judge William W. Caldwell directing dft Daddona to pay all outstanding amts owed to court reporter prior to sentencing. (cc: dft, USA, counsel, USM, USP, Court) (pr) [Entry date 04/19/93]
4/16/93	96	NOTICE OF COURT sentencing reset to 5/6/93, 4:00, Cohen (cc: dft (reg/cert mail), USA, counsel, USM, USP, Crt Reporter, Court) (pr) [Entry date 04/20/93]
4/21/93	97	MOTION to continue sentencing by defendant John Daddona (pr) [Entry date 04/22/93]
4/21/93	98	ORDER by Judge William W. Caldwell granting motion to continue sentencing by defendant John Daddona [97-1] sentencing reset to 5/6/93, 4:30, Daddona (cc: dft, USA, Ct. Rptr, Ct. Dpty, counsel, USM, USP, Court) (pr) [Entry date 04/22/93]
5/6/93	99	MINUTE SHEET: sentencing held. Dft Cohen present w/cnsl; sentencing imposed; See J&C. CTR: M. Zamiska (pr) [Entry date 05/10/93]
5/6/93	101	VOLUNTARY SURRENDER—dft to surrender to AG 6/14/93, 1:00. (cc: dft, USA, counsel, USM, USP, Court Bureau of Prisons) (pr) [Entry date 05/10/93]
5/6/93	102	MINUTE SHEET; sentencing held. Dft Daddona present w/cnsl. Sentence imposed. See J&C. CTR: M. Zamiska (pr) [Entry date 05/10/93]

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5/6/93	103	VOLUNTARY SURRENDER—dft Daddona to surrender to AG 6/14/93, 1:00. (cc: dft, USA, counsel, USM, USP, Court Bureau of Prisons) (pr) [Entry date 05/10/93]
5/7/93	100	JUDGMENT and Commitment by Judge William W. Caldwell sentencing Sidney Cohen (1) count(s) 2, 3, 4-5. Special assessments $50 per count, total $200; imprisonment 9 months on each count to run concurrently; supervised release 2 years on each count to run concurrently. (cc: dft, USA, counsel, USM (3), USP (2), BFP (5), Security, Financial, Terusso, Court) (pr) [Entry date 05/10/93]
5/7/93	104	JUDGMENT and Commitment by Judge William W. Caldwell sentencing John Daddona (2) count(s) 3, 4-5. Special assessments $50 per count, total $150; imprisonment 9 months each count to run concurrently; supervised release 2 years each count to run concurrently. (cc: dft, USA, counsel, USM (3), USP (2), BFP (5), Terusso, Financial, Security, Court) (pr) [Entry date 05/10/93]
5/10/93	105	JUDGMENT OF ACQUITTAL by Judge William W. Caldwell (cc: dft, USA, counsel, USM, USP, Court, Security) Sidney Cohen (1) count(s) 1. Acquitted by Jury on 9/18/92. (pr) [Entry date 05/11/93]
5/14/93	106	NOTICE of Appeal by defendant John Daddona [104-2] (cc: dft, USA, counsel, USP, CRT—w/ cc of dkt, jgmt, and 1st trans ltr (pr) [Entry date 05/17/93]
5/14/93	—	REMARK—TPO handed to messenger. (pr) [Entry date 05/17/93]
5/14/93	107	MOTION for release pending appeal by defendant John Daddona (pr) [Entry date 05/17/93]

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5/14/93	108	BRIEF/MEMORANDUM by defendant John Daddona in support of motion for release pending appeal by defendant John Daddona [107-1] (pr) [Entry date 05/17/93]
5/17/93	109	NOTICE of Appeal by defendant Sidney Cohen [100-2] (cc: dft, USA, counsel, USP, CRT—w/ cc of dkt, jgmt, and 1st trans ltr (pr) [Entry date 05/18/93]
5/17/93	110	MOTION for release pending appeal by defendant Sidney Cohen (pr) [Entry date 05/18/93]
5/17/93	111	BRIEF/MEMORANDUM by defendant Sidney Cohen in support of motion for release pending appeal by defendant Sidney Cohen [110-1] (pr) [Entry date 05/18/93]
5/17/93	—	REMARK—TPO sent to Atty Recchuiti. (pr) [Entry date 05/18/93]
5/19/93	112	MEMO RE: Presentence Report, enclosed are three copies for the Probation office AND same forwarded to USCA this date. (pr) [Entry date 05/19/93]
5/19/93	113	MEMO RE: Presentence Report, enclosed are three copies for the Probation office re: J. Daddona AND same forwarded to USCA this date. (pr) [Entry date 05/19/93]
5/21/93	114	MOTION for new trial by defendant John Daddona (pr) [Entry date 05/21/93]
5/21/93	114	BRIEF/MEMORANDUM by defendant John Daddona in support of motion for new trial by defendant John Daddona [114-1] (pr) [Entry date 05/21/93]
5/21/93	117	NOTIFICATION by Circuit Court of Appellate Docket Number 93-7338 & of dkting of Daddona's appeal 5/19/93. (pr) [Entry date 05/26/93]

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5/24/93	115	NOTIFICATION by Circuit Court of Appellate Docket Number 93-7351 & of dktng of dft Cohen's appeal on 5/21/93. (pr) [Entry date 05/25/93]
5/24/93	116	TRANSCRIPT Purchase Order by defendant Sidney Cohen ordering transcript of 5/6/93. (pr) [Entry date 05/25/93]
5/28/93	118	BRIEF/MEMORANDUM by plaintiff USA in opposition of motion for release pending appeal by defendant Sidney Cohen [110-1], motion for release pending appeal by defendant John Daddona [107-1] (pr) [Entry date 06/01/93]
6/3/93	119	TRANSCRIPT Purchase Order by defendant John Daddona ordering transcripts of hrg 3/30/93, sentencing 5/6/93. (pr) [Entry date 06/07/93]
6/4/93	120	MEMORANDUM by Judge William W. Caldwell, re: dfts motions for bail pending appeal. See order. (cc: dft, USA, counsel, USM, USP, Court) (pr) [Entry date 06/07/93]
6/4/93	120	ORDER by Judge William W. Caldwell denying motion for release pending appeal by defendant Sidney Cohen [110-1] denying motion for release pending appeal by defendant John Daddona [107-1] (cc. dft, USA, counsel, USM, USP, Court) (pr) [Entry date 06/07/93]
6/4/93	121	ORDER by Judge William W. Caldwell: 1) Judgmt of 5/7/93 is vacated as to surrender date of 6/14/93 for dfts but in no other way; 2) dfts shall be notified of new surrender date if pending motion for new trial is denied. (cc: dft, USA, BOP(3 cert), counsel, USM, USP, Court) (pr) [Entry date 06/10/93]

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6/7/93	122	REPLY by defendant John Daddona re [114-1] motion for new trial. (pr) [Entry date 06/10/93]
6/7/93	123	BRIEF/MEMORANDUM by plaintiff USA in opposition of motion for new trial by defendant John Daddona [114-1] (pr) [Entry date 06/10/93]
6/9/93	124	MOTION for new trial by defendant Sidney Cohen (pr) [Entry date 06/10/93]
6/9/93	125	BRIEF/MEMORANDUM by defendant Sidney Cohen in support of motion for new trial by defendant Sidney Cohen [124-1] (pr) [Entry date 06/10/93]
6/11/93	126	BRIEF/MEMORANDUM by plaintiff USA in opposition of motion for new trial by defendant Sidney Cohen [124-1] (pr) [Entry date 06/14/93]
6/22/93	127	TRANSCRIPT of sentencing 5/6/93 (Daddona), CTR: M. Zamiska (pr) [Entry date 06/23/93]
6/22/93	128	TRANSCRIPT of sentencing hrg held on 3/30/93, (re: Cohen & Daddona) CTR: M. Zamiska (pr) [Entry date 06/23/93]
6/22/93	129	TRANSCRIPT of Cohen's sentencing held on 5/6/93, CTR: M. Zamiska (pr) [Entry date 06/23/93]
6/22/93	130	STENO Notes/Tape of Proceedings of sentencing hrg (3/30/93) & sentencing, both dfts (5/6/93) by CTR: M. Zamiska (pr) [Entry date 06/23/93]
6/23/93	—	REMARK doc 130, steno notes, is located in Hbg file room. (pr) [Entry date 06/23/93]

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6/28/93	131	MOTION by defendant John Daddona for leave to take depos and employ subpoena power of Court, to obtain limited disc. from the govt. and to set disc. and briefing deadlines re: deft's mtn for new trial and c of s. (jh) [Entry date 06/28/93]
7/1/93	132	ORDER by Judge William W. Caldwell IT IS ORDERED THAT 1) Deft Daddona's mtn for disc. filed 6/28/93, is denied; and 2) Consideration of defts' mtn for a new trial based on after-discovered evidence is stayed pending remand by the USCA. [131-1] (cc: dft, USA, counsel, USM, USP, Court) (jh) [Entry date 07/01/93]
7/7/93	133	BRIEF by defendant John Daddona in support of his mtn for leave to take depos, to employ subpoena power of the court, to obtain limited disc. from the govt. and to set disc. and briefing deadlines re: deft's mtn for new trial. [131-1] (jh) [Entry date 07/09/93]
7/9/93	134	ORDER by Judge William W. Caldwell IT IS ORDERED THAT 1) Deft's mtn for reconsideration (entitled Brief re: disc. Doc. 133) is stayed pending remand of the case from the USCA; and 2) Upon remand, the USA shall have 10 days in which to file any desired brief in opp. to the mtn for reconsideration. (cc: dft, USA, counsel, USM, USP, Court) (jh) [Entry date 07/09/93]
7/15/93	135	APPEARANCE of Attorney for John Daddona by James G. Wiles (pr) [Entry date 07/16/93]
7/15/93	136	MOTION for reconsideration of 7/1/93 order by defendant John Daddona (pr) [Entry date 07/16/93]

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8/9/93	137	ORDER by Circuit Judge Becker denying dft motion to remand case to district court to decide motion for new trial. (pr) [Entry date 08/09/93]
9/23/93	138	MEMORANDUM & ORDER by Judge William W. Caldwell denying motion for reconsideration of 7/1/93 order by defendant John Daddona [136-1] denying motion for new trial by defendant Sidney Cohen [124-1] denying motion for new trial by defendant John Daddona [114-1] (cc: Security, USCA, dft, USA, counsel, Court) (pr) [Entry date 09/23/93] [Edit date 09/23/93]
9/30/93	139	MOTION for surrender date by USA as to Sidney Cohen, John Daddona (pr) [Entry date 10/01/93]
10/4/93	140	NOTICE of Appeal by defendant Sidney Cohen to USCA of order and memo dated 9/23/93. [138-1] (cc: dft, USA, counsel, USP, CRT—w/cc of dkt, and 1st trans ltr (pr) [Entry date 10/05/93]
10/4/93	—	REMARK—TPO mailed to Atty Recchuiti (pr) [Entry date 10/05/93]
10/4/93	141	NOTICE of Appeal by defendant John Daddona to USCA of memo & order dated 9/23/93. [138-1] (cc: dft, USA, counsel, USP, CRT—w/cc of dkt, order, and 1st trans ltr (pr) [Entry date 10/05/93]
10/4/93	—	RECEIVED fee from Sidney Cohen re [140-1] (pr) [Entry date 10/05/93]
10/4/93	142	NOTICE by J. Wiles, cnsl for defendant John Daddona of address change. (maintenance form sent) (pr) [Entry date 10/06/93]
10/4/93	—	REMARK—TPO mailed to Atty Wiles for dft Daddona. (pr) [Entry date 10/06/93]

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10/7/93	—	RECEIVED fee from John Daddona re [141-1] (pr) [Entry date 10/07/93]
10/8/93	143	RESPONSE by defendant Sidney Cohen to govt motion for surrender date [139-1] (pr) [Entry date 10/08/93]
10/14/93	144	TRANSCRIPT Purchase Order by defendant Sidney Cohen ordering no transcripts. (pr) [Entry date 10/19/93]
10/15/93	145	MOTION for new trial by John Daddona (pr) [Entry date 10/19/93]
10/18/93	146	NOTIFICATION by Circuit Court of Appellate Docket Number 93-7682 & of dkting of dft Cohen's appeal 10/12/93. (pr) [Entry date 10/20/93]
10/18/93	147	NOTIFICATION by Circuit Court of Appellate Docket Number 93-7683 & of dktng of dft Daddona's appeal 10/12/93. (pr) [Entry date 10/20/93]
10/19/93	148	ORDER by Judge William W. Caldwell denying dft's motion for new trial [145-1]. Dft shall make no further filings in this court until the US Court of Appeals has resolved the pending appeals. (cc: Daddona, Daniel, Wiles, Heidecker, Ct (cl) [Entry date 10/20/93]
10/21/93	149	BRIEF/MEMORANDUM by defendant Sidney Cohen, defendant John Daddona in opposition of motion for surrender date [139-1] (pr) [Entry date 10/21/93]
10/21/93	149	CROSS-MOTION for bail pending appeal by Sidney Cohen, John Daddona (pr) [Entry date 10/21/93]

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10/26/93	150	NOTICE of Appeal by defendant John Daddona to USCA of order dated 10/19/93. [148-1] (cc: dft, USA, counsel, USP, CRT—w/cc of dkt, jgmt, and 1st trans ltr (pr) [Entry date 10/27/93]
10/26/93	—	RECEIVED fee from John Daddona re [150-1], receipt # 111 113600 (pr) [Entry date 10/27/93]
10/26/93	—	REMARK—TPO sent to Atty Wiles. (pr) [Entry date 10/27/93]
11/4/93	151	NOTIFICATION by Circuit Court of Appellate Docket Number 93-7725 & of dkting dft Dadonna's 10/26/93 appeal 11/1/93. (pr) [Entry date 11/05/93]

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 93-7725 Filed: 11/1/93
Nsuit: 0
USA v. Daddona
Appeal from: U.S. District Court for the Middle District of Pennsylvania

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Lower court information:

District: 0314-1 : 92-cr-00179-2
Trial Judge: William W. Caldwell, District Judge
Court Reporter: Monica L. Zamiska
Date Filed: 7/28/92
Date order/judgment: 10/20/93
Date NOA filed: 10/26/93

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
Consolidated:				
	93-7338	93-7725	11/8/93	
	93-7338	93-7683	11/8/93	
	93-7351	93-7682	11/8/93	
Related:				
	93-7338	93-7351	5/21/93	

Proceedings include all events.
93-7725 USA v. Daddona

UNITED STATES OF AMERICA Appellee	Kim D. Daniel FAX 782-4882 717-782-4482 [COR NTC gvt] Office of United States Attorney Federal Building 228 Walnut Street P.O. Box 11754 Harrisburg, PA 17108
v.	
JOHN L. DADDONA Appellant	James G. Wiles 215-563-3622 Suite 200 [COR NTC ret] 1411 Walnut Street Philadelphia, PA 19102

Proceedings include all events.
93-7725 USA v. Daddona

UNITED STATES OF AMERICA

v.

JOHN DADDONA

John L. "Jack" Daddona,

Appellant

Proceedings include all events.

93-7725 USA v. Daddona

11/1/93	Criminal Case Docketed. Notice filed by John L. Daddona. (pat) [93-7725]
11/1/93	LETTER MOTION by Appellant in 93-7338, 93-7683 and 93-7725 to consolidate No. 93-7725 with Nos. 93-7338 and 93-7683, filed. Certificate of Service dated 10/29/93. (awi) [93-7338 93-7683 93-7725]
11/8/93	ORDER (Clerk) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 to consolidate appeals. The appeals at Nos. 93-7338, 93-7683 and 93-7725 are consolidated for briefing and disposition. The following briefing schedule covering all three appeals is imposed: Appellant's brief and appendix shall be filed and served on or before 11/15/93; Appellee's brief shall be filed and served on or before thirty (30) days from the date of service of appellant's brief and appendix; Appellant's reply brief shall be filed and served on or before fourteen (14) days from the date that appellee's brief is filed and served. (awi) [93-7338 93-7683 93-7725]
11/12/93	APPEARANCE from Attorney Kim D. Daniel on behalf of Appellee USA, filed. (pat) [93-7725]
11/15/93	TRANSCRIPT PURCHASE ORDER (PART I), no proceedings in District Court. (pat) [93-7725]
11/15/93	CERTIFIED LIST, filed. (pat) [93-7725]
11/15/93	APPENDIX on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Copies: 4, Volumes: 5, Delivered by mail, filed. Certificate of service date 11/15/93. (jlb) [93-7338 93-7683 93-7725]

Proceedings include all events.

93-7725 USA v. Daddona

11/15/93	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to remand new trial motions in case to US Dist Ct for Middle dist of PA. Certificate of Service dated 11/15/93. (awi) [93-7338 93-7683 93-7725]
11/15/93	APPEARANCE from Attorney James G. Wiles on behalf of Appellant John L. "Jack" Daddona, filed. (emd) [93-7725]
11/15/93	INFORMATION STATEMENT on behalf of Appellant, RECEIVED. (emd) [93-7725]
11/15/93	(POSITIVE) DISCLOSURE STATEMENT filed on behalf of Appellant John L. Daddona in 93-7725 advising: Summit Tax Exempt Bond Fund, L.P. (agb) [93-7725]
11/18/93	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation for brief to 66 Pages. Certificate of Service dated 11/17/93. (awi) [93-7338 93-7683 93-7725]
11/23/93	ORDER (Clerk) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation on brief with filing as of the date of this order. (awi) [93-7338 93-7683 93-7725]
11/23/93	BRIEF on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Pages: 66, Copies: 10, Delivered by mail, filed. Certificate of service date 11/15/93. See 11/23/93 Order. (jlb) [93-7338 93-7683 93-7725]
12/6/93	ORDER (Becker, Authoring Judge, Nygaard, Roth, Circuit Judges) denying motion by appellant to remand new trial motions to the district court, filed. in 93-7338, 93-7683, 93-7725. (rmg) [93-7338 93-7683 93-7725]
12/6/93	Certified copy of Order sent to Clerk of District Court. (rmg) [93-7338 93-7683 93-7725]

Proceedings include all events.

93-7725 USA v. Daddona

12/20/93	MOTION filed by Appellee in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation for brief to 61 Pages. Certificate of Service dated 12/15/93. (awi) [93-7338 93-7683 93-7725]
12/28/93	ORDER (Clerk) granting motion by Appellee in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation on brief with filing as of the date of this order. (awi) [93-7338 93-7683 93-7725]
12/28/93	BRIEF on behalf of Appellee USA in 93-7338, 93-7683, and 93-7725, Pages: 60, Copies: 10, Delivered by mail, filed. Certificate of Service date 12/15/93. See 12/28/93 Order. (jlb) [93-7338 93-7683 93-7725]
1/19/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to extend time to file reply brief. Certificate of Service dated 1/18/94. (awi) [93-7338 93-7683 93-7725]
1/26/94	ORDER (Clerk) considering motion by Appellant in 93-7338, 93-7683 and 93-7725 to extend time to file reply brief. It is noted that appellant has submitted a reply brief which was received on 1/24/94. The brief cannot be filed. In accordance with 3rd Cir. LAR 32.2, "footnotes shall be printed in the same size type utilized in the text." Appellant is directed to file an amended reply brief within fourteen (14) days from the date of this order and to file a motion for leave to file an amended brief. The amended brief shall correct the size of the footnotes so that they comply with 3rd Cir. LAR 32.2. It is also noted that an appendix was attached to the reply brief. Appellant is directed to file a motion for leave to file a supplemental appendix. (awi) [93-7338 93-7683 93-7725]

Proceedings include all events.

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2/2/94	AMENDED REPLY BRIEF on behalf of Appellant John L. Daddona in 93-7338/7683/7725, Copies: 10, Delivered by mail, filed. Certificate of service date 2/2/94. See 1/26/94 Order. (jlb) [93-7338 93-7683 93-7725]
2/3/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits "B" and "D" to reply brief as part of the record. Certificate of Service dated 2/1/94. **SEND TO MERITS PANEL** (awi) [93-7338 93-7683 93-7725]
2/14/94	ORDER (Clerk) referring to the merits panel the motion by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits to reply brief as a part of the record. The motion only addresses exhibits "B" and "D" and does not address exhibits "A" and "C". As it appears that exhibits "A" and "C" were also not of record in the district court, the motion will be construed as a motion to expand the record to include exhibits "A" and "C" and is referred to the merits panel for disposition. **SEND TO MERITS PANEL.** (awi) [93-7338 93-7683 93-7725]
2/17/94	CALENDARED for Thursday, May 19, 1994. Rescheduled from 5/20/94. (wab) [93-7338 93-7351 93-7682 93-7683 93-7725]
2/24/94	AMENDED ORDER (Clerk), referring to the merits panel the motion by Appellant to file Exhibits "B" & "D" to the reply brief as part of the record, filed. **SEND TO MERITS PANEL.** (93-7338, 93-7683, 93-7725) (mmb) [93-7338 93-7683 93-7725]
3/1/94	ORDER (Becker, Authoring Judge, Lewis, Circuit Judges, Irenas, District Judge) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits to reply brief as part of the record, filed. (awi) [93-7338 93-7683 93-7725]

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3/1/94	SUPPLEMENTAL APPENDIX attached to Reply Brief on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Delivered by mail, filed. Certificate of service date 2/2/94. See 3/1/94 Order. (jlb) [93-7338 93-7683 93-7725]
5/19/94	ARGUED 5/19/94 Panel: Becker, Lewis, Circuit Judges and Irenas, District Judge. At oral argument Counsel for appellant Wiles handed up Exhibits for Oral Argument. Court requested letter from counsel (Wiles and Daniel) on Status of Civil Claims pending/threatened within 7 days. (agb) [93-7338 93-7351 93-7683 93-7725]
5/25/94	Letter dated 5/24/94, from Kim D. Daniel, Esq., AUSA, received in accordance with the Court's direction at oral argument on 5/19/94, received. (mmb) [93-7338 93-7351 93-7683 93-7725]
5/27/94	Letter dated 5/27/94, from James G. Wiles, Esq., received in accordance with the Court' s direction at oral argument, received. (mmb) [93-7338 93-7351 93-7683 93-7725]
8/17/94	OPINION (Becker, Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge), filed. (cpm) [93-7338 93-7351 93-7683 93-7725]
8/17/94	JUDGMENT, the judgments of the district court entered May 10, 1993, October 20, 1993 and September 23, 1993 are AFFIRMED with respect to the judgments of conviction and the denial of the motions for a new trial. However, the sentences are VACATED and the cause is REMANDED to the district court for resentencing, filed. (cpm) [93-7338 93-7351 93-7683 93-7725]

Proceedings include all events.

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8/26/94	Letter dated August 24, 1994, from counsel for Appellee, advising of typographical error in the Court's slip opinion. (kot) [93-7338 93-7351 93-7683 93-7725]
9/7/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to stay mandate. Certificate of Service dated 9/7/94. (cpm) [93-7338 93-7683 93-7725]
9/23/94	ORDER (Becker, Circuit Judge) granting motion to stay mandate by Appellant John L. Daddona, in 93-7338, 93-7683 and 93-7725. Mandate stayed until October 7, 1994, filed. (cpm) [93-7338 93-7351 93-7683 93-7725]
9/29/94	ORDER AMENDING OPINION Becker and Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge, It appearing that although it was the intention of the Court to affirm the order appealed in No. 93-7682 in the opinion and judgment entered August 17, 1994 in appeal Nos. 93-7338, 93-7351, 93-7683 and 93-7725, see slip opinion at 12 n.12, due to a clerical error that docket number was not listed. It is hereby ORDERED that the caption of the August 17, 1994 opinion and judgment is amended to include docket No. 93-7682. It is further ORDERED that the certified judgment in lieu of formal mandate in No. 93-7682 shall issue forthwith, filed. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]
9/29/94	Certified copy of Order amending opinion sent to Clerk of District Court. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]

Proceedings include all events.

93-7725 USA v. Daddona

9/29/94	AMENDED JUDGMENT Becker and Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge, the judgments of the District Court entered May 10, 1993, October 20, 1993 and September 23, 1993 are AFFIRMED with respect to the judgments of conviction and the denial of the motions for a new trial. However, the sentences are vacated and the cause is remanded to the District Court for resentencing, filed. This judgment is amended to include docket No. 93-7682. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 93-7338 Filed: 5/19/93
Nsuit: 0
USA v. Daddona
Appeal from: U.S. District Court for the Middle District of Pennsylvania

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Lower court information:

District: 0314-1 : 92-00179-02
Trial Judge: William W. Caldwell, District Judge
Court Reporter: Monica L. Zamiska
Date Filed: 7/28/92
Date order/judgment: 5/10/93
Date NOA filed: 5/14/93

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
Consolidated:				
	93-7338	93-7683	11/8/93	
	93-7338	93-7725	11/8/93	
	93-7351	93-7682	11/8/93	
Related:				
	93-7338	93-7351	5/21/93	

Proceedings include all events.
93-7338 USA v. Daddona

UNITED STATES OF AMERICA
Appellee

Kim D. Daniel
FAX 782-4882
717-782-4482
[COR NTC gvt]
Office of United States Attorney
Federal Building
228 Walnut Street
P.O. Box 11754
Harrisburg, PA 17108

v.

JOHN L. DADDONA
Appellant

James G. Wiles
215-563-3622
Suite 200
[COR NTC ret]
1411 Walnut Street
Philadelphia, PA 19102

Proceedings include all events.
93-7338 USA v. Daddona

UNITED STATES OF AMERICA

v.

JOHN DADDONA

John L. "Jack" Daddona,

Appellant

Proceedings include all events.
93-7338 USA v. Daddona

5/19/93	Criminal Case Docketed. Notice filed by John L. Daddona. (emd) [93-7338]
5/20/93	PRESENTENCE REPORT (3 ccs) received from Clerk of DC. **[UNDER SEAL] SEND TO-MERITS PANEL** (emd) [93-7338]
6/1/93	TRANSCRIPT PURCHASE ORDER (Part I), ordering a transcript of the proceedings, filed. (mmb) [93-7338]
6/1/93	ORDER to Monica L. Zamiska in 93-7338 directing transcript, ordered on 5/20/93, to be filed by 6/22/93, filed. (mmb) [93-7338]
6/1/93	APPEARANCE from Attorney Kim D. Daniel on behalf of Appellee USA, filed (pat) [93-7338]
6/1/93	APPEARANCE from Attorney James G. Wiles on behalf of Appellant John L. Daddona, filed. (pat) [93-7338]
6/1/93	INFORMATION STATEMENT on behalf of Appellant, received. (pat) [93-7338]
6/7/93	TRANSCRIPT PURCHASE ORDER (Part II) filed by Monica L. Zamiska, filed. (mmb) [93-7338]
6/7/93	MOTION filed by Appellant to Remand case to the District Court. Certificate of Service dated 6/3/93. (rmg) [93-7338]
6/25/93	TRANSCRIPT PURCHASE ORDER (Part III) notifying transcript by Monica L. Zamiska in 93-7338 filed in D.C., filed. (mmb) [93-7338]
6/25/93	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 7/26/93. (pat) [93-7338]
6/30/93	RESPONSE by Appellee USA to Appellant's motion to remand to the District Court, received, untimely, not filed unless the Court directs. Certificate of service date 6/28/93. (rmg) [93-7338]

Proceedings include all events.
93-7338 USA v. Daddona

7/12/93	Reply Brief received from Appellant in support of his motion to Remand, received. Certificate of Service date 7/12/93. (rmg) [93-7338]
7/26/93	MOTION filed by Appellant to stay the briefing schedule pending this Court's decision on the Motion for Remand. Certificate of Service dated 7/23/93. (rmg) [93-7338]
8/2/93	ORDER (Clerk) granting motion by appellant to stay the briefing pending the motion to remand. In the event that the motion to remand is not granted, appellant's brief and appendix shall be filed within thirty (30) days from the date of this Court's order denying the motion to remand or referring the motion to the merits panel, filed. (rmg) [93-7338]
8/4/93	ORDER filed (Becker, Authoring Judge, Scirica, Alito, Circuit Judges) denying motion by Appellant to remand this case to the district court to decide a motion for new trial. (agp) [93-7338]
8/4/93	Certified copy of Order sent to Clerk of District Court. (agp) [93-7338]
8/12/93	MOTION filed by Appellant John L. Daddona to reconsider Court's order dated 8/4/93 denying motion to remand to the District Court or, in the alternative, to refer said motion to the merits panel. Certificate of Service dated 8/11/93. (dlr) [93-7338]
8/12/93	MOTION filed by Appellant John L. Daddona to hold briefing in abeyance until disposition of Appellant's reconsideration motion. Certificate of Service dated 8/7/93. (dlr) [93-7338]

Proceedings include all events.
93-7338 USA v. Daddona

8/16/93	ORDER (Clerk) granting motion by Appellant John Daddona to stay briefing schedule pending disposition of the motion for reconsideration. In the event that the Court, on the reconsideration of the Court's August 4, 1993 order, denies the motion to remand or refers the matter to the merits panel, appellant's brief and appendix shall be filed within 21 days from the date of the Court's order denying remand or referring the matter to the merits panel. (dlr) [93-7338]
8/27/93	RESPONSE by Appellee in opposition to appellant's motion to reconsider order of 8/4/93 which denied appellant's motion to remand case to district court. Received untimely, not filed unless the Court directs. Certificate of service dated 8/26/93. (rmg) [93-7338]
9/27/93	ORDER filed (Becker, Authoring Judge, Scirica, Alito, Circuit Judges) denying motion by Appellant for reconsideration of motions panel's 8/4/93 order denying motion for remand. (agp) [93-7338]
9/27/93	COPY OF Memorandum & Order of District Court, dated 9/23/93, denying motion for reconsideration of 7/1/93, order and denying motion for new trial. In accordance with Fed. R. Crim. P. 58(g) & F.R.A.P. 4(b), any appeal of this order must be taken within 10 days of the filing hereof, filed. (Cov. 93-7338 & 93-7351) (mmb) [93-7338]
9/28/93	Clerk's letter to counsel advising in accordance with this Court's order of 9/27/93, appellant's brief & appendix are due by 10/27/93. (mmb) [93-7338]

Proceedings include all events.
93-7338 USA v. Daddona

10/18/93	MOTION filed by Appellant in 93-7338 and 93-7683 to consolidate these appeals for all purposes and to stay the briefing pending a decision by the District Court on Appellant's renewed motion for new trial. Certificate of Service dated 10/14/93. (rmg) [93-7338 93-7683]
10/27/93	ORDER (Clerk) considering the motion by appellant Daddona to consolidate appeals 93-7338 & 93-7683 for all purposes and to Stay the briefing pending the District Court's action on the motion for new trial. Consolidating the appeals for briefing and disposition. Vacating the previously issued briefing schedule in No. 93-7338. A consolidated briefing schedule shall be issued. Denying the request to stay the appeals pending disposition by the district court of the motion for a new trial. In the absence of a motion to remand it appears that the district court would lack jurisdiction. *See e.g., United States v. Davis*, 924 F. 2d 501 (3d Cir. 1991), filed. in 93-7338, 93-7683 (rmg) [93-7338 93-7683]
11/1/93	LETTER MOTION by Appellant in 93-7338, 93-7683 and 93-7725 to consolidate No. 93-7725 with Nos. 93-7338 and 93-7683, filed. Certificate of Service dated 10/29/93. (awi) [93-7338 93-7683 93-7725]
11/8/93	ORDER (Clerk) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 to consolidate appeals. The appeals at Nos. 93-7338, 93-7683 and 93-7725 are consolidated for briefing and disposition. The following briefing schedule covering all three appeals is imposed: Appellant's brief and appendix shall be filed and served on or before 11/15/93; Appellee's brief

Proceedings include all events.
93-7338 USA v. Daddona

	shall be filed and served on or before thirty (30) days from the date of service of appellant's brief and appendix; Appellant's reply brief shall be filed and served on or before fourteen (14) days from the date that appellee's brief is filed and served. (awi) [93-7338 93-7683 93-7725]
11/15/93	APPENDIX on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Copies: 4, Volumes: 5, Delivered by mail, filed. Certificate of service date 11/15/93. (jlb) [93-7338 93-7683 93-7725]
11/15/93	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to remand new trial motions in case to US Dist Ct for Middle Dist of PA. Certificate of Service dated 11/15/93. (awi) [93-7338 93-7683 93-7725]
11/18/93	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation for brief to 66 Pages. Certificate of Service dated 11/17/93. (awi) [93-7338 93-7683 93-7725]
11/23/93	ORDER (Clerk) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation on brief with filing as of the date of this order. (awi) [93-7338 93-7683 93-7725]
11/23/93	BRIEF on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Pages: 66, Copies: 10, Delivered by mail, filed. Certificate of service date 11/15/93. See 11/23/93 Order. (jlb) [93-7338 93-7683 93-7725]
12/6/93	ORDER (Becker, Authoring Judge, Nygaard, Roth, Circuit Judges) denying motion by appellant to remand new trial motions to the district court, filed. in 93-7338, 93-7683, 93-7725. (rmg) [93-7338 93-7683 93-7725]

Proceedings include all events.
93-7338 USA v. Daddona

12/6/93	Certified copy of Order sent to Clerk of District Court. (rmg) [93-7338 93-7683 93-7725]
12/20/93	MOTION filed by Appellee in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation for brief to 61 Pages. Certificate of Service dated 12/15/93. (awi) [93-7338 93-7683 93-7725]
12/28/93	ORDER (Clerk) granting motion by Appellee in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation on brief with filing as of the date of this order. (awi) [93-7338 93-7683 93-7725]
12/28/93	BRIEF on behalf of Appellee USA in 93-7338, 93-7683, and 93-7725, Pages: 60, Copies: 10, Delivered by mail, filed. Certificate of Service date 12/15/93. See 12/28/93 Order. (jlb) [93-7338 93-7683 93-7725]
1/19/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to extend time to file reply brief. Certificate of Service dated 1/18/94. (awi) [93-7338 93-7683 93-7725]
1/26/94	ORDER (Clerk) considering motion by Appellant in 93-7338, 93-7683 and 93-7725 to extend time to file reply brief. It is noted that appellant has submitted a reply brief which was received on 1/24/94. The brief cannot be filed. In accordance with 3rd Cir. LAR 32.2, "footnotes shall be printed in the same size type utilized in the text." Appellant is directed to file an amended reply brief within fourteen (14) days from the date of this order and to file a motion for leave to file an amended brief. The amended brief shall correct the size of the footnotes so that they comply with 3rd Cir. LAR 32.2. It is also noted that an appendix was

	attached to the reply brief. Appellant is directed to file a motion for leave to file a supplemental appendix. (awi) [93-7338 93-7683 93-7725]
2/2/94	AMENDED REPLY BRIEF on behalf of Appellant John L. Daddona in 93-7338/7683/7725, Copies: 10, Delivered by mail, filed. Certificate of service date 2/2/94. See 1/26/94 Order. (jlb) [93-7338 93-7683 93-7725]
2/3/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits "B" and "D" to reply brief as part of the record. Certificate of Service dated 2/1/94. **SEND TO MERITS PANEL** (awi) [93-7338 93-7683 93-7725]
2/14/94	ORDER (Clerk) referring to the merits panel the motion by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits to reply brief as a part of the record. The motion only addresses exhibits "B" and "D" and does not address exhibits "A" and "C". As it appears that exhibits "A" and "C" were also not of record in the district court, the motion will be construed as a motion to expand the record to include exhibits "A" and "C" and is referred to the merits panel for disposition. **SEND TO MERITS PANEL.** (awi) [93-7338 93-7683 93-7725]
2/17/94	CALENDARED for Thursday, May 19, 1994. Rescheduled from 5/20/94. (wab) [93-7338 93-7351 93-7682 93-7683 93-7725]
2/24/94	AMENDED ORDER (Clerk), referring to the merits panel the motion by Appellant to file Exhibits "B" and "D" to the reply brief as part of the record, filed. **SEND TO MERITS PANEL.** (93-7338, 93-7683, 93-7725) (mmb) [93-7338 93-7683 93-7725]

Proceedings include all events.
93-7338 USA v. Daddona

3/1/94	ORDER (Becker, Authoring Judge, Lewis, Circuit Judges, Irenas, District Judge) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits to reply brief as part of the record, filed. (awi) [93-7338 93-7683 93-7725]
3/1/94	SUPPLEMENTAL APPENDIX attached to Reply Brief on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Delivered by mail, filed. Certificate of service date 2/2/94. See 3/1/94 Order. (jlb) [93-7338 93-7683 93-7725]
5/19/94	ARGUED 5/19/94 Panel: Becker, Lewis, Circuit Judges and Irenas, District Judge. At oral argument Counsel for appellant Wiles handed up Exhibits for Oral Argument. Court requested letter from counsel (Wiles and Daniel) on Status of Civil Claims pending/threatened within 7 days. (agb) [93-7338 93-7351 93-7683 93-7725]
5/25/94	Letter dated 5/24/94, from Kim D. Daniel, Esq., AUSA, received in accordance with the Court's direction at oral argument on 5/19/94, received. (mmb) [93-7338 93-7351 93-7683 93-7725]
5/27/94	Letter dated 5/27/94, from James G. Wiles, Esq., received in accordance with the Court's direction at oral argument, received. (mmb) [93-7338 93-7351 93-7683 93-7725]
6/13/94	LETTER MOTION by Appellant for a copy of a transcript of oral argument, filed. Certificate of Service dated 6/6/94. (awi) [93-7338]
6/22/94	ORDER (Clerk) considering motion by Appellant fora copy of transcript of oral argument. Mr. Daddona is granted leave to have a transcript prepared from the tape. Any such transcript will not be an official record of the Court and may not be cited as such, filed. (awi) [93-7338]

Proceedings include all events.
93-7338 USA v. Daddona

8/17/94	OPINION (Becker, Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge), filed. (cpm) [93-7338 93-7351 93-7683 93-7725]
8/17/94	JUDGMENT, the judgments of the district court entered May 10, 1993, October 20, 1993 and September 23, 1993 are AFFIRMED with respect to the judgments of conviction and the denial of the motions for a new trial. However, the sentences are VACATED and the cause is REMANDED to the district court for resentencing, filed. (cpm) [93-7338 93-7351 93-7683 93-7725]
8/26/94	Letter dated August 24, 1994, from counsel for Appellee, advising of typographical error in the Court's slip opinion. (kot) [93-7338 93-7351 93-7683 93-7725]
9/7/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to stay mandate. Certificate of Service dated 9/7/94. (cpm) [93-7338 93-7683 93-7725]
9/23/94	ORDER (Becker, Circuit Judge) granting motion to stay mandate by Appellant John L. Daddona, in 93-7338, 93-7683 and 93-7725. Mandate stayed until October 7, 1994, filed. (cpm) [93-7338 93-7351 93-7683 93-7725]
9/29/94	ORDER AMENDING OPINION Becker and Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge, It appearing that although it was the intention of the Court to affirm the order appealed in No. 93-7682 in the opinion and judgment entered August 17, 1994 in appeal Nos. 93-7338, 93-7351, 93-7683 and 93-7725, see slip opinion at 12 n. 12, due to a clerical error that docket number was not listed. It is hereby ORDERED that the caption of the August 17, 1994 opinion and judgement is amended to include docket No. 93-7682. It is

Proceedings include all events.
93-7338 USA v. Daddona

	further ORDERED that the certified judgment in lieu of formal mandate in No. 93-7682 shall issue forthwith, filed. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]
9/29/94	Certified copy of Order amending opinion sent to Clerk of District Court. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]
9/29/94	AMENDED JUDGMENT Becker and Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge, the judgments of the District Court entered May 10, 1993, October 20, 1993 and September 23, 1993 are AFFIRMED with respect to the judgments of conviction and the denial of the motions for a new trial. However, the sentences are vacated and the cause is remanded to the District Court for resentencing, filed. This judgment is amended to include docket No. 93-7682. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]

GENERAL DOCKET FOR
Third Circuit Court of Appeals

Court of Appeals Docket #: 93-7683 Filed: 10/12/93
Nsuit: 0
USA v. Daddona
Appeal from: U.S. District Court for the Middle District of Pennsylvania

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Lower court information:

District: 0314-1 : 92-cr-00179-2
Trial Judge: William W. Caldwell, District Judge
Court Reporter: Monica L. Zamiska
Date Filed: 7/28/92
Date order/judgment: 9/23/93
Date NOA filed: 10/4/93

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
Consolidated:				
	93-7338	93-7683	11/8/93	
	93-7338	93-7725	11/8/93	
	93-7351	93-7682	11/8/93	
Related:				
	93-7338	93-7351	5/21/93	

Proceedings include all events.
93-7683 USA v. Daddona

UNITED STATES OF AMERICA
Appellee

Kim D. Daniel
FAX 782-4882
717-782-4482
[COR NTC gvt]
Office of United States Attorney
Federal Building
228 Walnut Street
P.O. Box 11754
Harrisburg, PA 17108

v.

JOHN L. DADDONA
Appellant

James G. Wiles
215-563-3622
Suite 200
[COR NTC ret]
1411 Walnut Street
Philadelphia, PA 19102

Proceedings include all events.
93-7683 USA v. Daddona

UNITED STATES OF AMERICA

v.

JOHN DADDONA

John L. "Jack" Daddona,

Appellant

Proceedings include all events.
93-7683 USA v. Daddona

10/12/93	Criminal Case Docketed. Notice filed by John L. Daddona. (pat) [93-7683]
10/13/93	Notice received from district court that the docketing and filing fees have been paid by the appellant on 10/7/93. (mmb) [93-7683]
10/18/93	APPEARANCE from Attorney Kim D. Daniel on behalf of Appellee USA, filed. (pat) [93-7683]
10/18/93	MOTION filed by Appellant in 93-7338 and 93-7683 to consolidate these appeals for all purposes and to stay the briefing pending a decision by the District Court on Appellant's renewed motion for new trial. Certificate of Service dated 10/14/93. (rmg) [93-7338 93-7683]
10/26/93	FOLLOW UP LETTER to James L. Heidecker and James G. Wiles requesting the following documents: **Appearance Form **Disclosure Statement **Information Statement (pat) [93-7683
10/26/93	APPEARANCE from Attorney James G. Wiles on behalf of Appellant John L. Daddona, filed. (pat) [93-7683]
10/26/93	INFORMATION STATEMENT on behalf of Appellant, RECEIVED. (pat) [93-7683]
10/27/93	ORDER (Clerk) considering the motion by appellant Daddona to consolidate appeals 93-7338 & 93-7683 for all purposes and to Stay the briefing pending the District Court's action on the motion for new trial. Consolidating the appeals for briefing and disposition. Vacating the previously issued briefing schedule in No. 93-7338. A consolidated briefing schedule shall be issued. Denying the request to stay the appeals pending disposition by the district court

Proceedings include all events.
93-7683 USA v. Daddona

	of the motion for a new trial. In the absence of a motion to remand it appears that the district court would lack jurisdiction. *See e.g., United States v. Davis*, 924 F.2d 501 (3d Cir. 1991), filed. in 93-7338, 93-7683 (rmg) [93-7338 93-7683]
11/1/93	LETTER MOTION by Appellant in 93-7338, 93-7683 and 93-7725 to consolidate No. 93-7725 with Nos. 93-7338 and 93-7683, filed. Certificate of Service dated 10/29/93. (awi) [93-7338 93-7683 93-7725]
11/8/93	ORDER (Clerk) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 to consolidate appeals. The appeals at Nos. 93-7338, 93-7683 and 93-7725 are consolidated for briefing and disposition. The following briefing schedule covering all three appeals is imposed: Appellant's brief and appendix shall be filed and served on or before 11/15/93; Appellee's brief shall be filed and served on or before thirty (30) days from the date of service of appellant's brief and appendix; Appellant's reply brief shall be filed and served on or before fourteen (14) days from the date that appellee's brief is filed and served. (awi) [93-7338 93-7683 93-7725]
11/10/93	FOLLOW UP LETTER to James G. Wiles requesting the following documents: **Disclosure Statement (pat) [93-7683]
11/15/93	TRANSCRIPT PURCHASE ORDER (PART I), no proceedings in District Court. (pat) [93-7683]

Proceedings include all events.
93-7338 USA v. Daddona

11/15/93	CERTIFIED LIST, filed. (pat) [93-7683]
11/15/93	APPENDIX on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Copies: 4, Volumes: 5, Delivered by mail, filed. Certificate of service date 11/15/93. (jlb) [93-7338 93-7683 93-7725]
11/15/93	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to remand new trial motions in case to US Dist Ct for Middle Dist of PA. Certificate of Service dated 11/15/93. (awi) [93-7338 93-7683 93-7725]
11/18/93	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation for brief to 66 Pages. Certificate of Service dated 11/17/93. (awi) [93-7338 93-7683 93-7725]
11/18/93	DISCLOSURE STATEMENT on behalf of Appellant John L. Daddona, filed. (pat) [93-7683]
11/23/93	ORDER (Clerk) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation on brief with filing as of the date of this order. (awi) [93-7338 93-7683 93-7725]
11/23/93	BRIEF on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Pages: 66, Copies: 10, Delivered by mail, filed. Certificate of service date 11/15/93. See 11/23/93 Order. (jlb) [93-7338 93-7683 93-7725]
12/6/93	ORDER (Becker, Authoring Judge, Nygaard, Roth, Circuit Judges) denying motion by appellant to remand new trial motions to the district court, filed. in 93-7338, 93-7683, 93-7725. (rmg) [93-7338 93-7683 93-7725]

Proceedings include all events.
93-7683 USA v. Daddona

12/6/93	Certified copy of Order sent to Clerk of District Court. (rmg) [93-7338 93-7683 93-7725]
12/20/93	MOTION filed by Appellee in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation for brief to 61 Pages. Certificate of Service dated 12/15/93. (awi) [93-7338 93-7683 93-7725]
12/28/93	ORDER (Clerk) granting motion by Appellee in 93-7338, 93-7683 and 93-7725 for enlargement of page limitation on brief with filing as of the date of this order. (awi) [93-7338 93-7683 93-7725]
12/28/93	BRIEF on behalf of Appellee USA in 93-7338, 93-7683, and 93-7725, Pages: 60, Copies: 10, Delivered by mail, filed. Certificate of Service date 12/15/93. See 12/28/93 Order. (jlb) [93-7338 93-7683 93-7725]
1/19/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to extend time to file reply brief. Certificate of Service dated 1/18/94. (awi) [93-7338 93-7683 93-7725]
1/26/94	ORDER (Clerk) considering motion by Appellant in 93-7338, 93-7683 and 93-7725 to extend time to file reply brief. It is noted that appellant has submitted a reply brief which was received on 1/24/94. The brief cannot be filed. In accordance with 3rd Cir. LAR 32.2, "footnotes shall be printed in the same size type utilized in the text." Appellant is directed to file an amended reply brief within fourteen (14) days from the date of this order and to file a motion for leave to file an amended brief. The amended brief shall correct the size of the footnotes so that they comply with 3rd

Proceedings include all events.
93-7683 USA v. Daddona

	Cir. LAR 32.2. It is also noted that an appendix was attached to the reply brief. Appellant is directed to file a motion for leave to file a supplemental appendix. (awi) [93-7338 93-7683 93-7725]
2/2/94	AMENDED REPLY BRIEF on behalf of Appellant John L. Daddona in 93-7338/7683/7725, Copies: 10, Delivered by mail, filed. Certificate of service date 2/2/94. See 1/26/94 Order. (jlb) [93-7338 93-7683 93-7725]
2/3/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits "B" and "D" to reply brief as part of the record. Certificate of Service dated 2/1/94. **SEND TO MERITS PANEL** (awi) [93-7338 93-7683 93-7725]
2/14/94	ORDER (Clerk) referring to the merits panel the motion by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits to reply brief as a part of the record. The motion only addresses exhibits "B" and "D" and does not address exhibits "A" and "C". As it appears that exhibits "A" and "C" were also not of record in the district court, the motion will be construed as a motion to expand the record to include exhibits "A" and "C" and is referred to the merits panel for disposition. **SEND TO MERITS PANEL.** (awi) [93-7338 93-7683 93-7725]
2/17/94	CALENDARED for Thursday, May 19, 1994. Rescheduled from 5/20/94. (wab) [93-7338 93-7351 93-7682 93-7683 93-7725]
2/24/94	AMENDED ORDER (Clerk), referring to the merits panel the motion by Appellant to file Exhibits "B" & "D" to the reply brief as part

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	of the record, filed. **SEND TO MERITS PANEL.** (93-7338 93-7683 93-7725) (mmb) [93-7338 93-7683 93-7725]
3/1/94	ORDER (Becker, Authoring Judge, Lewis, Circuit Judges, Irenas, District Judge) granting motion by Appellant in 93-7338, 93-7683 and 93-7725 for leave to file Exhibits to reply brief as part of the record, filed. (awi) [93-7338 93-7683 93-7725
3/1/94	SUPPLEMENTAL APPENDIX attached to Reply Brief on behalf of Appellant John L. Daddona in 93-7338, 93-7683, and 93-7725, Delivered by mail, filed. Certificate of service date 2/2/94. See 3/1/94 Order. (jlb) [93-7338 93-7683 93-7725]
5/19/94	ARGUED 5/19/94 Panel: Becker, Lewis, Circuit Judges and Irenas, District Judge. At oral argument Counsel for appellant Wiles handed up Exhibits for Oral Argument. Court requested letter from counsel (Wiles and Daniel) on Status of Civil Claims pending/threatened within 7 days. (agb) [93-7338 93-7351 93-7683 93-7725]
5/25/94	Letter dated 5/24/94, from Kim D. Daniel, Esq., AUSA, received in accordance with the Court's direction at oral argument on 5/19/94, received. (mmb) [93-7338 93-7351 93-7683 93-7725]
5/27/94	Letter dated 5/27/94, from James G. Wiles, Esq., received in accordance with the Court's direction at oral argument, received. (mmb) [93-7338 93-7351 93-7683 93-7725]
8/17/94	OPINION (Becker, Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge), filed. (cpm) [93-7338 93-7351 93-7683 93-7725]

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8/17/94	JUDGMENT, the judgments of the district court entered May 10, 1993, October 20, 1993 and September 23, 1993 are AFFIRMED with respect to the judgments of conviction and the denial of the motions for a new trial. However, the sentences are VACATED and the cause is REMANDED to the district court for resentencing, filed. (cpm) [93-7338 93-7351 93-7683 93-7725]
8/26/94	Letter dated August 24, 1994, from counsel for Appellee, advising of typographical error in the Court's slip opinion. (kot) [93-7338 93-7351 93-7683 93-7725]
9/7/94	MOTION filed by Appellant in 93-7338, 93-7683 and 93-7725 to stay mandate. Certificate of Service dated 9/7/94. (cpm) [93-7338 93-7683 93-7725]
9/23/94	ORDER (Becker, Circuit Judge) granting motion to stay mandate by Appellant John L. Daddona, in 93-7338, 93-7683 and 93-7725. Mandate stayed until October 7, 1994, filed. (cpm) [93-7338 93-7351 93-7683 93-7725]
9/29/94	ORDER AMENDING OPINION Becker and Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge, It appearing that although it was the intention of the Court to affirm the order appealed in No. 93-7682 in the opinion and judgment entered August 17, 1994 in appeal Nos. 93-7338, 93-7351, 93-7683 and 93-7725, see slip opinion at 12 n.12, due to a clerical error that docket number was not listed. It is hereby ORDERED that the caption of the August 17, 1994 opinion and judgment is amended to include docket No. 93-7682. It is further ORDERED that the certified judgment

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	in lieu of formal mandate in No. 93-7682 shall issue forthwith, filed. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]
9/29/94	Certified copy of Order amending opinion sent to Clerk of District Court. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]
9/29/94	AMENDED JUDGMENT Becker and Lewis, Circuit Judges and Irenas, Authoring Judge, District Judge, the judgments of the District Court entered May 10, 1993, October 20, 1993 and September 23, 1993 are AFFIRMED with respect to the judgments of conviction and the denial of the motions for a new trial. However, the sentences are vacated and the cause is remanded to the District Court for resentencing, filed. This judgment is amended to include docket No. 93-7682. (cpm) [93-7338 93-7351 93-7682 93-7683 93-7725]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CASE NO. 1:CR-92-179-02
	:	
v.	:	(Judge Caldwell)
	:	
SIDNEY COHEN and JOHN L. "JACK" DADDONA	:	

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

Conspiracy To Transport A Fraudulently-Obtained Security In Interstate Commerce

Between on or about August 18, 1987, and on or about November 17, 1987, in Dauphin County, Pennsylvania and within the Middle District of Pennsylvania, and elsewhere, the defendant,

SIDNEY COHEN

did knowingly and intentionally combine, agree, confederate and conspire with Daniel J. Culnen and others, known and unknown, to commit an offense against the United States, to wit: Interstate Transportation of a Fraudulently Obtained Security, in violation of Title 18 U.S.C. § 2314.

A. BACKGROUND

1. At all times relevant hereto, Green Hill Associates (Green Hill) was a limited partnership primarily owned and operated by the defendant **Sidney COHEN.** Green Hill was the developer of a 30 building, 240 unit, apartment building complex in Susquehanna Township, Dauphin County, Pennsylvania, known as the Green Hill Apartment Project (the Project).

2. On June 1, 1986, Green Hill entered into an $8,900,000 mortgage loan agreement with the Summit Tax Exempt Bond Fund, L.P. (Summit) of New York, N.Y. to finance construction of the Project.

3. Under the terms of the $8.9 million loan agreement, Green Hill submitted monthly requisition requests for construction-related expenditures to Summit. After the requisition was approved, Summit would authorize the release of loan proceeds to Green Hill from a construction Trust Account at the Dauphin Deposit Bank and Trust Company in Harrisburg, Pennsylvania (the Trust Account).

4. The initial General Contractor hired by Green Hill to construct the apartment buildings was the Susquehanna Construction Corporation (Susquehanna).

5. By the Spring of 1987 the Project was behind schedule. As a result, on or about July 1, 1987, Summit threatened foreclosure on the $8,900,000 mortgage unless Green Hill remedied the situation by July 29, 1987.

6. **Sidney COHEN** wanted to replace Susquehanna with a new buildings contractor, Eastern Consolidated Utilities, Inc. (Eastern) of Macungie, Pa., which was owned and operated by John L. "Jack" Daddona. However, under the terms of the $8,900,000 loan agreement, **COHEN** could not make the substitution without Summit's consent. Summit agreed to the substitution, but only upon the condition that Eastern provide Green Hill Performance and Labor/Materials bonds in the amount of $3,000,000.

7. A Performance Bond would guarantee the owner of the Project that the job would be completed if Eastern failed to perform its contract. A Labor/Materials Bond would guarantee the owner of the Project that subcontractors would be paid for materials and labor furnished to the Project in the event Eastern failed to pay the subcontractors.

8. At all times hereto Daniel J. Culnen was the owner and chief executive officer of Culnen & Hamilton, Inc. and C & H Agency, Inc., two independent insurance brokerage firms in Totowa, NJ.

9. On or about July 27, 1987, Culnen executed, sealed and delivered $3,000,000 Performance and Labor/Materials Bonds, ostensibly issued by the Employees Insurance of Wausau, A Mutual Company (Wausau), to John "Jack" Daddona of Eastern.

10. Daddona relayed the $3,000,000 Bonds to **COHEN** who caused copies of the Bonds to be forwarded to Summit on July 30, 1987. As a result, Summit did not foreclose on the mortgage and allowed the Project to proceed.

11. The premium charged for the Bonds by Culnen was $42,413. Upon **COHEN'S** request, Summit agreed to finance Green Hill's payment of the premium with proceeds from the $8,900,000 loan.

12. In June of 1987 Culnen had provided **COHEN** unrelated consultation services with respect to Green Hill's claim against Susquehanna's bond company. For these services Culnen charged **COHEN** $10,000. However, at no time did Summit agree to finance or pay Culnen's $10,000 consultation fee.

B. MANNER AND MEANS

13. The objective of the conspiracy was to defraud Summit of $10,000. The conspirators effected the scheme by Culnen's preparation of a single invoice for his consultation services and the Bonds' premium in the amount of $52,413. **COHEN** then fraudulently submitted the $52,413 invoice to Summit as the invoice for the Bonds' premium. After Summit released $52,413 from the Trust Account, **COHEN** and Culnen converted the extra $10,000 to their own use.

C. OVERT ACTS

The co-conspirators committed the following overt acts, among others, in furtherance of the conspiracy:

14. On **COHEN'S** instructions, on August 18, 1987, Culnen prepared and forwarded a C & H Agency invoice in the amount of $52,413 to Jack Daddona, who forwarded the invoice to **COHEN.**

15. On or about October 7, 1987, **COHEN** submitted the C & H Agency Invoice for $52,413 to Summit as the invoice for the $3,000,000 Bonds.

16. As a result, on October 21, 1987, a check payable to Green Hill in the amount of $52,413 was released by Summit from the Trust Account. On October 22, 1987, **COHEN** caused this check to be deposited into a Green Hill checking account

at the Dauphin Deposit Bank and Trust Company in Harrisburg, Pa. That same day **COHEN** issued a check on that account payable to C & H Agency in the amount of $52,413.

17. On October 28, 1987, Culnen endorsed the $52,413 Green Hill check and deposited it into a C & H Agency checking account at the Carteret People's Bank in Carteret, NJ.

18. On November 12, 1987, Culnen issued a check payable to **COHEN** in the amount of $10,000 on the C & H Agency checking account at the Carteret Peoples Bank.

19. On November 17, 1987, **COHEN** deposited the $10,000 C & H Agency check into a checking account he shared with his wife at the Fidelity Bank in Philadelphia, PA.

All in violation of Title 18 U.S.C. § 371.

THE GRAND JURY FURTHER CHARGES:

For purposes of Count II, the information and allegations set forth in Count I are specifically incorporated herein.

COUNT II
Interstate Transportation Of
A Fraudulently Obtained Security

On or about October 28, 1987, in Dauphin County, Pennsylvania and within the Middle District of Pennsylvania and elsewhere, the defendant,

SIDNEY COHEN

did transport, and did unlawfully cause to be transported, in interstate commerce, a security having a value of $5,000 or more, knowing same to have been taken by fraud, to wit; in that **COHEN** caused a Green Hill Associates check dated October 22, 1987, payable to C & H Agency in the amount of $52,413 to be transported from the Carteret Peoples Bank in Carteret, NJ, to the Dauphin Deposit Bank and Trust Company in Harrisburg, PA, knowing that said check contained $10,000 of funds that had been taken by fraud from the Summit Tax Exempt Bond Fund, L.P.

All in violation of Title 18 U.S.C. §§ 2314 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT III
Conspiracy To Commit Mail Fraud

Between on or about December 1, 1987, and October 13, 1988, in Dauphin County, Pennsylvania and within the Middle District of Pennsylvania and elsewhere, the defendants,

SIDNEY COHEN
and
JOHN L. "JACK" DADDONA,

did knowingly and intentionally combine, agree, confederate and conspire with one another, Daniel J. Culnen, and others, known and unknown, to commit an offense against the United States, to wit: Mail Fraud, a violation of Title 18, U.S.C. § 1341.

A. BACKGROUND

1. At all times relevant hereto, Green Hill Associates (Green Hill) was a limited partnership primarily owned and operated by the defendant **Sidney COHEN**. Green Hill was the developer of a 30 building, 240 unit, apartment complex in Susquehanna Township, Dauphin County, Pennsylvania, known as the Green Hill Apartment Project (the Project).

2. On June 1, 1986, Green Hill entered into an $8,900,000 mortgage loan agreement with the Summit Tax Exempt Bond Fund, L.P. (Summit) of New York, N.Y. to finance construction of the Project. The loan was personally guaranteed by **COHEN.** A principal executive officer of Summit was Stuart J. Boesky.

3. Under the terms of the $8.9 million loan agreement, Green Hill submitted monthly requisition requests to Summit. After the requisition was approved, Summit would authorize the release of loan proceeds to Green Hill from a construction Trust Account at the Dauphin Deposit Bank and Trust Company in Harrisburg, Pennsylvania (the Trust Account).

4. The initial General Contractor hired by Green Hill to construct the apartment buildings was the Susquehanna Construction Corporation (Susquehanna).

5. By the Spring of 1987 the Project was behind schedule. As a result, on or about July 1, 1987, Summit threatened fore-

closure on the mortgage unless Green Hill remedied the situation by July 29, 1987.

6. **Sidney COHEN** wanted to replace Susquehanna with a new contractor, Eastern Consolidated Utilities, Inc. (Eastern) of Macungie, Pa., which was owned and operated by the defendant, **John L. "Jack" DADDONA**. On July 20, 1987, Eastern and Green Hill entered into a $4,300,000 contract to complete the apartment buildings. However, under the terms of the $8,900,000 loan agreement, COHEN could not substitute Eastern for Susquehanna without Summit's consent. Summit agreed to the substitution, but only upon the express condition that Eastern obtain Performance and Labor/Materials Bonds in the amount of $3,000,000.

7. A Performance bond would guarantee the owner of the Project that the job would be completed if Eastern failed to perform its contract. A Labor/Materials bond would guarantee the owner of the Project that subcontractors would be paid for materials and labor furnished to the Project if Eastern failed to pay the subcontractors.

8. At all times hereto Daniel J. Culnen was the owner and chief executive officer of Culnen & Hamilton, Inc. and C & H Agency, Inc., two independent insurance brokerage firms headquartered in Totowa, NJ. Eastern was one of Culnen's bond and insurance clients.

9. One of the companies Culnen represented in the sale of Performance and Labor/Materials bonds was Employers Insurance of Wausau, A Mutual Company (Wausau). Although Culnen had been provided blank Wausau bond forms, a corporate seal and original power of attorney forms to issue these types of bonds, Culnen did not have the authority to issue Eastern and Green Hill the $3,000,000 Bonds without Wausau's knowledge and consent.

10. After **COHEN** and **DADONNA** executed an Indemnity Agreement that made them personally liable for any claims paid on the Bonds, on July 27, 1987, Culnen executed, sealed and delivered $3,000,000 Wausau Performance and Labor/Materials Bonds to **DADDONA** without Wausau's knowledge or consent. Culnen's signature on the Bonds was witnessed by his Bond Manager under the fictitious name of "B. Adams."

11. **DADDONA** relayed the $3,000,000 Bonds to **COHEN** who caused copies to be forwarded to Summit on July 30, 1987. As a result, Summit did not foreclose on the mortgage and allowed the Project to proceed.

12. Between August and October of 1987 **COHEN** and **DADONNA** caused copies of the $3,000,000 Bonds to be shown and distributed to various subcontractors in order to induce them to return to the job site and commit additional labor and materials to the Project.

13. The premium charged for the Bonds by Culnen was $42,413. Upon **COHEN'S** request, Summit agreed to finance Green Hill's payment of the premium with proceeds from the $8,900,000 loan.

14. On or about October 7, 1987, **COHEN** submitted a C & H Agency Invoice for $52,413 to Summit as the invoice for the $3,000,000 Bonds. As a result, on October 21, 1987, a check payable to Green Hill in the amount of $52,413 was released by Summit from the Trust Account.

15. On October 22, 1987, **COHEN** caused the $52,413 check to be deposited into a Green Hill checking account at the Dauphin Deposit Bank and Trust Company in Harrisburg, Pa. That same day **COHEN** issued a Green Hill check on that account payable to C & H Agency in the amount of $52,413.

16. On October 28, 1987, Culnen endorsed and deposited the $52,413 Green Hill check into a C & H Agency checking account at the Carteret Peoples Bank in Carteret, NJ. At no time did Culnen report or forward any portion of the Bonds' $42,413 premium to Wausau.

17. Although work on the Project resumed in August of 1987, by December it was again far behind schedule. Finally, on February 5, 1988, Summit filed a mortgage foreclosure action against Green Hill in U.S. District Court.

18. On April 8, 1988, a settlement in lieu of foreclosure was reached whereby Green Hill assigned its deed to the Project and its rights under the Green Hill-Eastern contract to Summit's nominee, Green Hill Project Investor's Inc. (Investors) of New York, N.Y. As part of the settlement Green Hill also escrowed its beneficial interest in the $3,000,000 Wausau Bonds to Investors. In exchange, Investors and Summit paid Green Hill $216,000.

19. On April 14, 1988, Jack Meyers and Leslie Stewart, two subcontractors who worked on the Project, filed written claims with Wausau against the Bonds claiming Eastern owed them monies for their work on the Project.

20. On September 30, 1988, Summit filed a written claim with Wausau against the Bonds, claiming Eastern's failure to perform its contract caused Summit to suffer $3,000,000 in damages.

B. MANNER AND MEANS

21. The objectives of the conspiracy were to defraud WAUSAU, Summit, Investors and various subcontractors who relied upon the Bonds in committing labor and materials to the Project. The conspirators defrauded WAUSAU by not reporting Culnen's issuance of the Bonds or his receipt of the $42,213 premium and dividing it among themselves. The conspirators defrauded Summit and Investors by returning the Bonds without Summit's knowledge and later purporting to escrow Green Hill's beneficial interest in the Bonds to Investors as part of the foreclosure settlement. The conspirators also defrauded Summit, Investors and the subcontractors by falsely representing to Wausau that the Bonds were forgeries and had not been executed or delivered by Culnen after claims were filed against the Bonds.

C. OVERT ACTS

The defendants and their co-conspirators committed the following overt acts, among others, in furtherance of the conspiracy:

21. [sic] On or about December 1, 1987, **COHEN** and **DADDONA** returned the $3,000,000 Bonds to Culnen in Totowa, NJ. At no time did **COHEN** or **DADDONA** disclose this fact to Summit or the Project subcontractors.

22. After Wausau notified Culnen that it had received an inquiry on the Bonds from Jack Meyers, on March 27, 1988, **COHEN, DADDONA,** and Culnen traveled to New Cumberland, PA to attempt to persuade Meyers and Leslie Stewart not to file claims against the Bonds.

23. On April 1, 1988, **COHEN, DADDONA,** and Culnen again traveled to New Cumberland, PA to attempt to persuade Meyers and Stewart not to file claims against the Bonds.

24. On April 6, 1988, Culnen again met with Meyers in Totowa, NJ to attempt to persuade him not to file a claim against the Bonds.

25. On April 8, 1988, **COHEN** traveled to Harrisburg, PA, and assigned Green Hill's deed to the Project and rights under the Green Hill-Eastern contract to Investors. **COHEN** also escrowed Green Hill's beneficial interest in the Bonds to Investors. In exchange, Summit and Investors paid Green Hill $216,000. However, at no time did **COHEN** inform Summit's or Investor's representatives that he had returned the Bonds to Culnen approximately 4 months earlier.

26. After Meyers and Stewart had filed written claims against the Bonds with Wausau, on April 15, 1988, Culnen sent a letter to Ken Gelok, Wausau's Regional Bond Manager, advising him that the bonds were "never executed and delivered."

27. On or about April 20, 1988, Culnen met with Gelok in Totowa, NJ and assured him that the $3,000,000 bonds did not bear his signature. During this meeting **COHEN** telephonically advised Gelok that "as far as he was concerned, there are no bonds, there were no bonds, and there will be no bonds."

28. On April 22, 1988, Culnen sent a second letter to Gelok in which he represented that he had contacted **DADDONA** in the mountains of Alaska and the conclusion they came to was Jack Meyers had forged Culnen's signature on the $3,000,000 bonds.

29. As a result of their misrepresentations and actions, **COHEN, DADDONA** and Culnen induced WAUSAU to deny Meyers' and Leslie Stewart's claims against the Bonds by correspondence dated April 26, 1988.

30. On May 11, 1988, Culnen issued **DADDONA** a $32,413 credit against his Culnen & Hamilton account balance as his share of the $42,413 premium.

31. On May 16, 1988, Culnen and Gelok travelled to Macungie, PA and met with **DADDONA**. During this meeting **DADDONA** falsely represented to Gelok that he did not know who the "B. Adams" was that witnessed Culnen's signature on the Bonds.

32. Also on May 16, 1988, Culnen met with **COHEN** in Macungie, Pa. and gave him a C & H Agency check for $10,000 as his share of the $42,413 premium.

33. On May 17, 1988, **COHEN** deposited the May 16, 1988, $10,000 C & H Agency check into a checking account he shared with his wife at the Fidelity Bank in Philadelphia, PA.

34. On June 21, 1988, Culnen wrote a letter to Wausau's home offices in which he falsely represented that the Bonds were never delivered.

35. On August 11, 1988, **COHEN, DADDONA** and Culnen met in Harrisburg, Pa. to discuss their future course of conduct regarding the Bonds.

36. As a result of their misrepresentations and actions, **COHEN, DADDONA** and Culnen induced WAUSAU to deny Summit's claim against the Bonds by correspondence dated October 7, 1988.

All in violation of Title 18 U.S.C. § 371.

THE GRAND JURY FURTHER CHARGES:

For purposes of Counts IV thru VI, the information and allegations set forth in Count III of this Indictment are specifically incorporated herein.

COUNT IV
Mail Fraud

On or about April 26, 1988, in Dauphin County, Pennsylvania and within the Middle District of Pennsylvania and elsewhere, the defendants,

SIDNEY COHEN
and
JOHN L. "JACK" DADDONA

having devised and intended to devise a scheme to defraud and obtain money and property by means of false pretenses as set forth in Count III of this Indictment, did, for the purpose of executing and in order to effect the scheme and artifice, knowingly cause to be delivered by mail, according to the direction thereon, a letter dated April 26, 1988, from the Employers Insurance of Wausau, A Mutual Company, Wausau, Wisconsin, to John W. Meyers, President, Construction Management Corporation, P.O. Box 1326, Harrisburg, PA 17105-1326.

All in violation of Title 18 U.S.C. §§ 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT V
Mail Fraud

On or about April 26, 1988, in Dauphin County, Pennsylvania and within the Middle District of Pennsylvania and elsewhere, the defendants,

SIDNEY COHEN
and
JOHN L. "JACK" DADDONA

having devised and intended to devise a scheme to defraud and obtain money and property by means of false pretenses as set forth in Count III of this Indictment, did, for the purpose of executing and in order to effect the scheme and artifice, knowingly cause to be delivered by mail, according to the direction thereon, a letter dated April 26, 1988, from the Employers Insurance of Wausau, A Mutual Company, Wausau, Wisconsin, to Leslie D. Stewart, President, York Excavating Company, Inc., Route 3, P.O. Box 77B, York, PA 17401.

All in violation of Title 18 U.S.C. §§ 1341 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT VI
Interstate Transportation Of A Fraud Victim

On or about April 8, 1988, in Dauphin County, Pennsylvania and within the Middle District of Pennsylvania and elsewhere, the defendant,

SIDNEY COHEN,

having devised and intended to devise the aforesaid scheme and artiface [sic] to defraud for obtaining money and property by means of false and fraudulent pretenses, representations and promises, as set forth in Count III of this Indictment, did transport and cause one Stuart J. Boesky to be transported from New York, NY to Harrisburg, PA in the execution of the aforesaid scheme and artifice to defraud the Summit Tax Exempt Bond Fund, L.P. and Green Hill Project Investors, Inc. of property having a value of $5,000 or more, to wit: $216,000.

All in violation of Title 18, United States Code Sections 2314 and 2.

A TRUE BILL

/s/ KAREN L. CRITCHFIELD
FOREPERSON

July 28, 1992
DATE

/s/ JAMES J. WEST
JAMES J. WEST
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff	:	
vs.	:	
SIDNEY COHEN,	:	CRIMINAL NO. 1:CR-92-179-01
JOHN L. "JACK" DADDONA, Defendants	:	CRIMINAL NO. 1:CR-92-179-02

ORDER

AND NOW, this 25th day of January, 1993, upon consideration of defendants' post-trial motions, it is ordered that:

1. Defendants' motions for a new trial based on newly discovered evidence are denied.

2. Defendants' motions for new trial or judgment of acquittal are denied.

/s/ WILLIAM W. CALDWELL
William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff	:	
vs.	:	CRIMINAL NO. 1:CR-92-179-02
JOHN L. "JACK" DADDONA, Defendant	:	

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Following his conviction on September 18, 1992, on September 25, 1992, defendant filed a motion for a new trial. Because the trial transcript was not available, on September 29, 1992, an order was entered which afforded defendant thirty (30) days from receipt of the transcript to brief his motion. The transcript was filed on October 29, 1992, so that defendant's brief was due by November 30, 1992.

No brief was filed, but more significant is the fact that no extension was sought before the due date of November 30, 1992. In fact nothing occurred for nearly six weeks thereafter, until January 5, 1993, when defendant belatedly requested an extension of time. The government opposes the late filing of defendant's brief, particularly when the reasons for the delay in failing to file timely, or in failing to make a timely request for an extension, are so inadequately stated. We conclude the government's position is well taken.

It is Ordered that defendant's motion to file a brief in support of his post trial motion is denied.

/s/ WILLIAM W. CALDWELL
William W. Caldwell
United States District Judge

Date: January 15, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff	:	
vs.	:	
SIDNEY COHEN,	:	CRIMINAL NO. 1:CR-92-179-01
JOHN L. "JACK" DADDONA, Defendants	:	CRIMINAL NO. 1:CR-92-179-02

MEMORANDUM

On September 18, 1992, following a five-day trial, defendants were convicted by a jury of various offenses, including interstate transportation of a fraudulently obtained security, conspiracy to commit mail fraud, and mail fraud.[1] Both defendants have filed motions for new trial or judgment of acquittal as well as separate motions for new trial based on newly discovered evidence.[2] We will discuss the grounds presented by their filings.

I. Law and Discussion

A. Newly Discovered Evidence

The newly discovered evidence claimed by defendants is not really evidence; it consists of their learning, allegedly after trial, that an important government witness and co-conspirator in this case, Daniel J. Culnen, had testified as a government witness in 1976 and 1977 in *United States v. Grasso*, an unrelated criminal case tried in the Eastern District of Pennsyl-

1. Defendant Daddona was not convicted of interstate transportation of a fraudulently obtained security.

2. Defendant Daddona timely briefed the motion concerning newly discovered evidence but not his other post-trial motion. We have not, therefore, addressed any contentions in the latter that were not raised by Cohen.

vania.[3] The motions allege that Culnen was a conspirator in that case who was never charged, and/or was given immunity from prosecution. It is further alleged that Culnen acknowledged in the *Grasso* case that he participated in a scheme that defendants claim was similar to the one in this case.[4] No further information or confirmation of these allegations has been forthcoming.

Pursuant to Fed. R. Crim. P. 33, a new trial may be granted where newly discovered evidence is found. However, courts are to view such motions with disfavor. See *United States v. Fowler*, 735 F.2d 823, 830 (5th Cir. 1984). A stringent five-part test must be met before relief on this ground is appropriate:

> 1) The evidence must have been discovered since trial.
>
> 2) An inference of diligence on the part of the movant must appear in the facts alleged.
>
> 3) The newly discovered evidence must not be merely cumulative or impeaching.
>
> 4) It must be material to the issues involved.
>
> 5) It must be of such nature as that, on a new trial, it would probably produce an acquittal.

See United States v. Adams, 759 F.2d 1099 (3d Cir. 1985). It is immediately apparent that these tests have not been met and, in fact, are not addressed by defendants.

Putting aside for the moment whether the allegations of the motion qualify as newly discovered "evidence," there are some indications that Culnen's participation in the Eastern District Court case was known to the defense before trial. More importantly, there has been a lack of diligence on the part of the defendants in investigating or developing why Culnen's role in that case is significant here. Instead, the defendants

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3. Culnen previously entered a guilty plea in *this* court to mail fraud, arising out of the same transactions in which the defendants were involved. *See U.S.A. v. Culnen*, 1:CR-91-105-01.

4. The assistant U.S. attorney who prosecuted *Grasso* in the Eastern District has indicated to the government that there was no agreement with Culnen concerning his testimony in that case in 1976 and 1977.

attempt to shift to the prosecution the responsibility of disproving the speculation in their motions.

It is clear that pursuit of the allegations would lead only to evidence that, if admissible, might impeach Culnen's credibility. Certainly, it would not be material to whether Cohen and Daddona committed the offenses charged here. Relief is not appropriate where newly discovered evidence may be used only for the purpose of impeachment. *United States v. Adams, supra.*[5] Finally, nothing has been suggested to cause the court to conclude that in a new trial an acquittal would be probable because of the alleged new evidence. The matters advanced by defendants are simply no more than vague and uncertain references to Culnen's status in an unrelated case.[6]

Additionally, the information contained in defendants' brief does not constitute "evidence." Evidence is more than speculation or rumor. *See United States v. Scherer*, 673 F.2d 176, 179-80 (7th Cir. 1982); *Novelty Textile Mills, Inc. v. Stern*, 136 F.R.D. 63, 73 (S.D.N.Y. 1991). Certainly, defendants would not be able to offer this speculation as evidence in any new trial.

The cases relied on by defendants are inapposite and clearly distinguishable. In *Giglio v. United States*, 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972), the government failed to disclose that its key witness, *upon whom its entire case depended*, had at one time been promised immunity from prosecution for the offense at hand in exchange for his testimony. The witness testified at trial that he had not been promised immunity and

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5. This is hardly a recent pronouncement. *See, e.g., Southard, et al v. Russel*, 57 U.S. (Howard) 547, 14 L.Ed. 1052 (1854) ("A bill of review. . . cannot be maintained where the newly discovered evidence, upon which the bill purports to be founded, goes to impeach the character of witnesses examined in the original suit."). Indeed, the principle has its roots in English common law. *Id.* at 568.

6. If we were to believe the allegation, it would merely demonstrate that Culnen was an unindicted co-conspirator in a 1976 case and that the subject matter of that case was similar to the instant charges. This evidence, if admissible, would only impeach Culnen's credibility. The jury was already aware (1) that Culnen pleaded guilty to being involved with the defendants in the fraud alleged, and (2) that Culnen was cooperating with the government in the cases against the defendants.

the circuit court labelled this a "deliberate deception." In *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975), the government suppressed evidence that its key witness, who at first (under oath) did not implicate the defendant, was given protective custody and was paid $1,000 per month by the government pending trial.

The information proffered in the motions does not fit within the definition of and requirements for newly discovered evidence and defendants' motions for relief on this ground will be denied.

B. Judgment of Acquittal

Defendant Sidney Cohen has moved for judgment of acquittal on a number of grounds, some of which are also raised by Daddona. We will discuss them *seriatim*.

1. Indictment Variance and Intangible Rights

Defendant Cohen notes that the indictment alleges interstate transportation of fraudulently obtained securities that were the property of Summit Tax Exempt Bond Fund ("Summit"). He argues that the securities were actually his property; the property of a company he owned, Green Hill Associates; or the property of Dauphin Deposit Trust ("Dauphin Deposit"), the bank in which the funds were deposited.

The argument is without merit. There was testimony at trial that the funds paid as part of the scheme were to be released from Dauphin Deposit *only* with the approval of Summit, and that Summit would not have given approval had it known of defendant's scheme. Therefore, Summit did suffer a loss as a part of the scheme.

Alternatively, Cohen claims that the funds were Dauphin Deposit's, because they were on account there. This is a specious argument. A bank does not own the money deposited with it; it acts as a trustee while the real owner remains the depositor. *In re Erie Forge & Steel Corp*, 456 F.2d 801, 804 (3d Cir. 1972); *see also, United States v. Levy*, 579 F.2d 1332 (5th Cir. 1978) (on similar facts, court found conviction proper).

2. Government Chart Used in Closing

In closing argument, the Government used a large chart purporting to summarize the testimony of the prosecution's witnesses. Although no objection was made at trial, defendants now complain that the Court erred in allowing that use.[7] Although a waiver occurred, we will not rest solely on that ground.

The chart merely summarized the testimony given, including certain dates. Before closing arguments, we admonished the jury:

> I want to caution you that this [chart] is not an exhibit in this case. This is [the U.S. Attorney's] recollection of testimony and exhibits. And if anything that he indicates to you from this chart is not in accord with your collective recollection, obviously it's your recollection that controls. So, I don't want you to give any special significance to what is portrayed on this document . . .

Transcript at 881-82. The Government repeated that cautionary note early in its closing. Allowing a party to use a summary chart during closing rests within the discretion of the trial court. *See United States v. Le Bar*, 521 F. Supp. 203, 225 (M.D. Pa. 1981) (Muir, J.)[8]. We believe the chart was properly utilized and that there was ample caution exercised to insure [sic] that the jury understood that the chart was only the Government's recital of the testimony.

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7. The chart was not admitted into evidence for use by the jury in its deliberations.

8. Defendant attempts to use *Le Bar* to bolster his argument because, there, the court did not allow defense counsel to use charts that the Government had not seen until the time of closing. Defendant's reliance is misplaced. In *Le Bar*, there were 10 charts and the court required that the defense allow the Government an opportunity to review the chart to make any objections to its accuracy. Defense counsel rejected an offered recess to allow the Government to review the charts and, so, the court did not permit their use. These facts are clearly distinguishable from the case at bar. Here, only one chart was used and defense counsel made no request for time to examine it. Defendant does not contend that the chart was inaccurate and, in fact, Cohen's counsel himself used the chart in closing arguments.

3. Indictment, Verdict Sheets, and Jury Question

The defendants also challenge our sending the indictment to the jury without certain instructions, our formulation of the verdict sheets, and our answering of a jury question during deliberations.

Again, those objections were not raised during trial and may be considered waived. In any event, defendants argue that we erred by sending the indictment to the jury room without instructing the jury that the indictment is only an accusation and not evidence. This argument is flawed in two respects: (1) during voir dire, we instructed all potential jurors that the indictment constituted the Government's allegations only and (2) at the time we charged the jury, we asked defense counsel if they had further requests for jury instructions. *United States v. Todaro*, 448 F.2d 64, 66 (3d Cir. 1971). They did not. The objection, then, is waived. *Waldorf v. Shuta*, 896 F.2d 723, 739 (3d Cir. 1990).

Defendants also contend that the verdict forms were misleading, but offer no elucidation. We believe the forms adequately described the offenses. Even if they did not, we carefully instructed the jury:

> The verdict form indicates the count, the identification of a defendant and the charge. Under each charge there [are] several lines in parentheses. I have placed that there merely to assist you in making sure that you're dealing with the general subject matter in the indictment. So I don't want you to attach any particular significance to any words that I might have chosen to use. You'll have the indictment and you can determine exactly what it charges and what it says.

Transcript at 1001-02. Defendants' contention is without substance.

Defendants also assert that our answer to a jury question was misleading. The question concerned whether the jury had to find certain facts before it could convict the defendants of conspiracy. With the participation of counsel, we answered the

question. Our answer was somewhat unclear at first but, after a discussion at side bar, we corrected it to the apparent satisfaction of counsel. We fail to see how that series of events could have misled the jury and defendants offer nothing more than the bare assertion that it did. Indeed, the initial error was in regard to information that was immaterial to the question asked.

4. Check Swapping

Defendants further argue that we erred in allowing the Government to cross-examine defendant Cohen about alleged "check swapping," an offense with which the defendants were not charged. Defendants premise this argument on Fed. R. Evid. 404(b), which precludes evidence of other crimes, wrongs, or acts to show action in conformity therewith. We have carefully reviewed the transcript. The Government questioned Cohen about the alleged check swapping as a means to impeach his direct testimony—that he had never seen the check that was one of those purportedly swapped. Such a use of a prior act is allowable, because it is not for the purpose of showing conformity therewith, but for impeachment. *United States v. Jabbour*, slip op. no. 84-00545 (E.D. Pa. May 8, 1985). Defendants might have requested a limiting instruction, but failed to do so. *United States v. Simmons*, 679 F.2d 1042, 1050 (3d Cir. 1982).

5. Allegedly Fabricated Exhibits

Defendants finally argue, without substantiation, that three exhibits were admitted without proper authentication and that they were somehow fabricated. The transcript indicates that each document was properly authenticated. Beyond that, defendants failed to object at trial and now fail to offer any evidence that the documents were anything but what they were represented to be.

We will issue an appropriate order.

/s/ WILLIAM W. CALDWELL

William W. Caldwell
United States District Judge

Date: January 25, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff	:	
vs.	:	
SIDNEY COHEN,	:	CRIMINAL NO. 1:CR-92-179-01
JOHN L. "JACK" DADDONA, Defendants	:	CRIMINAL NO. 1:CR-92-179-02

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS

Pending is Defendants' motion for a new trial based on after-discovered evidence and Defendant Daddona's motion for various forms of discovery.

I. Facts and Procedural History

On September 18, 1992, following a five-day trial, Defendants were convicted by a jury of various offenses, including interstate transportation of a fraudulently obtained security, conspiracy to commit mail fraud, and mail fraud.[1] On January 25, 1993, Defendants' post-trial motions were denied. On May 6, 1993, each Defendant was sentenced to nine months' [sic] incarceration and ordered to report to the Bureau of Prisons on June 14, 1993. On June 4, 1993, we denied Defendants' motions for bail pending appeal, but delayed the reporting date pending disposition of the motion concerning after-discovered evidence.

A. Motion for Discovery

Defendant Daddona has filed a motion asking for the full panoply of discovery normally afforded a criminal defendant

1. Defendant Daddona was not convicted of interstate transportation of a fraudulently obtained security.

before trial. He apparently seeks this discovery in connection with his recently filed motion for a new trial based on after-discovered evidence, referred to below.

Defendant relies on Fed. R. Crim. P. 16 and 17 for this request. Those provisions relate to pre-trial discovery and we can find no authority to support Defendant's post-trial request. Additionally, Defendant has already filed a brief in support of his motion and the Government has responded.

Accordingly, we will deny the motion.

B. Motion Based on After-Discovered Evidence

On May 21, 1993, Defendant Daddona filed, and Defendant Cohen later joined, a motion for new trial based on after-discovered evidence. On May 14 and 17, 1993, Defendants Daddona and Cohen, respectively, appealed their convictions and sentences to the United States Court of Appeals for the Third Circuit and, at this writing, we are without jurisdiction to consider the motion. Fed. R. Crim. P. 33. Therefore, we will stay consideration of the motion until the Third Circuit has remanded the cases, either before or after consideration.

AND NOW, this 1st day of July, 1993, it is ordered that:

1. Defendant Daddona's motion for discovery filed June 28, 1993, is denied.

2. Consideration of Defendants' motion for a new trial based on after-discovered evidence is stayed pending remand by the United States Court of Appeals for the Third Circuit.

/s/ WILLIAM W. CALDWELL

William W. Caldwell
United States District Judge

James L. Heidecker Jr., Esq.
Lawyers Professional Building
27 North Seventh Street
Allentown, PA 18101

Re: 1:92-cr-00179

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff	:	
vs.	:	
SIDNEY COHEN,	:	CRIMINAL NO. 1:CR-92-179-01
JOHN L. "JACK" DADDONA, Defendants	:	CRIMINAL NO. 1:CR-92-179-02

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Defendant has filed a brief in support of his motion for discovery, which we denied by order of July 1, 1993. He asks that we consider the brief a motion for reconsideration.

On May 14, 1993, Defendant filed an appeal of his conviction and sentence with the United States Court of Appeals for the Third Circuit. The filing of an appeal is an event of jurisdictional significance such that the district court is divested of jurisdiction over virtually all proceedings. *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985). As we noted in our order of July 1, 1993, we may not consider a motion such as the one for discovery until the case is remanded.

AND NOW, this 9th day of July, 1993, it is ordered that:

1. Defendant's motion for reconsideration is stayed pending remand of the case from the United States Court of Appeals for the Third Circuit.

2. Upon remand, the United States shall have ten (10) days in which to file any desired brief in opposition to the motion for reconsideration.

/s/ WILLIAM W. CALDWELL
William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
	:	
vs.	:	
	:	
SIDNEY COHEN,	:	CRIMINAL NO. 1:CR-92-179-01
JOHN L. "JACK" DADDONA,	:	CRIMINAL NO. 1:CR-92-179-02
Defendants	:	

MEMORANDUM

We are considering Defendants' motion for a new trial based on after-discovered evidence. We will also deny a motion for reconsideration of an order entered July 1, 1993.[1]

I. Introduction

As we have fully described the facts in our previous Memoranda, we will not repeat them here. The current motion was filed on May 21, 1993, by Defendant Daddona and a brief in support was filed concurrently. The Government opposed the motion with a brief filed on June 7, 1993. On June 9, 1993, Defendant Cohen joined in the motion. We issued an order on July 1, 1993, staying consideration of the motion because both Defendants had appealed their convictions and sentences to the United States Court of Appeals for the Third Circuit. Defendant Daddona then filed a motion in the Third Circuit seeking a remand for us to consider the motion concerning after-discovered evidence. Judge Becker of the Third Circuit denied the motion to remand on August 9, 1993.

While the Third Circuit has not yet disposed of the appeals in this case, we have discovered precedent that would allow us to consider the new trial motion during the pendency of the

1. Actually this would be a second reconsideration of the matter raised in the motion. See order of July 9, 1993.

appeals. In *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the United States Supreme Court indicated that a district court could retain jurisdiction to consider a Fed. R. Crim. P. 33 motion for a new trial after an appeal had been filed. *Id.* at 667 n.42. Given *Cronic* and the benefit of avoiding piecemeal appeals in this case, we have elected to consider the current motion now rather than wait for the mandate of the Third Circuit.

The Defendants contend that the testimony of Government witness Norman Tandy was perjurious, that the Government knew of the perjury, and that this purported fraud warrants a new trial. Tandy was a key government witness on the issue of loss caused by Defendants' fraud. Defendants base their motion on two writings styled "depositions," one of Robert Earl Yingling and the other of Daniel Keller Sangree, two employee [sic] of the Yingling Construction Company, a subcontractor involved in this case. We note that these statements, which are subscribed with an oath, are not depositions in that the Government was given neither notice nor an opportunity to cross-examine the witnesses. Fed. R. Crim. P. 15, 17. We will regard them as affidavits or statements, although the lack of opportunity for the Government to cross-examine the witnesses is troubling.

As noted, Defendants proffer the testimony of two employees of a subcontractor that worked on the Green Hill project, Yingling Construction Company.

A. Robert Earl Yingling

In his statement, Robert Yingling testified that two men, apparently employees of the management firm that took over the Green Hill project after Eastern Consolidated Utilities, Inc. ("Eastern") left the site, asked him to inflate the costs on bills he submitted.

> Q Was there instructions that were given you concerning billing by Global or Liberty?
>
> A Yeah.
>
> Q Tell me about that.
>
> A They wanted me to pad the bills.

Q Who told you to pad the bills?

A Rick Weiss and Bach. I'm saying these names, and I believe that's them.

Statement of Robert Earl Yingling at 9. However, Yingling clearly indicated that he did not inflate the bill.

A . . . When I refused to do it, they asked Dan Sangree to do it. They asked him with me. When I refused, he refused. And they asked him again, he refused again.

Id. at 13. Yingling further testified that he believed the subcontractors who completed the job after the Eastern termination could have completed it at the original contract price. *Id.* at 11. Counsel questioned Yingling as to whether any other subcontractors had told him of similar requests to pad their bills.

A I didn't have it exact in those words, but Tom Strawbridge said — Tom Strawbridge is another born again Christian who would not do stuff like that, and Tom Strawbridge told me he was asked to do stuff he would not do.

Id. at 14.

Finally, Yingling indicated that he told the assistant United States attorney that he believed the bills were padded and that the construction could have been completed at the original contract price.

B. Daniel Keller Sangree

Daniel Keller Sangree, another employee of Yingling Construction Company, testified in his new "deposition" that Mr. Weiss asked him to pad the bills. Statement of Daniel Keller Sangree at 10. He claimed that Weiss wanted Yingling Construction Company to increase the cost on the bill and pay Weiss the difference — a kickback. *Id.* As with Yingling, Sangree testified that he did not inflate the bill. *Id.* at 12.

II. Law and Discussion

The standard for review of a motion for a new trial based on after-discovered evidence is well-established.

1. the evidence must be in fact newly discovered; i.e., discovered since trial.

2. facts must be alleged from which the court may infer diligence on the part of the movant;

3. the evidence relied on must not be merely cumulative or impeaching;

4. it must be material to the issues involved; and

5. it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Government of the Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985).

We find two fatal flaws in Defendants' motion. First, there is no evidence of due diligence by counsel to discover this alleged fraud. Counsel clearly had access to Yingling and Sangree (as well as other subcontractors) before the trial and, in fact, had an opportunity to cross-examine them at trial. That so glaring an accusation as a request to "pad" bills escaped discovery during or before trial strongly suggests a lack of diligence by counsel. Reading the transcript of Yingling's recent "deposition," replete as it is with indignation at the purported request, it is difficult to believe that his accusation would not have been discovered before trial had counsel exercised diligence.

Second, and more to the point, both witnesses testified that they did *not* inflate their bills and neither could name any subcontractor who did. Therefore, the testimony regarding the loss occasioned by the Defendants' fraud in this case was not inaccurate. The evidence, if introduced at trial, would only have been potentially used for impeachment. As such, it can not be the basis for a new trial. *Lima, supra.*

Yingling's suggestion that the project might have been completed at the original contract price is his opinion. As such, it is not evidence. Certainly, Defendants had the opportunity at trial to solicit expert testimony to the same effect.

Yingling also indicated that he shared his concern about bill "padding" with the assistant United States attorney.

A prosecutor has the duty to make available to a defendant exculpatory evidence as well as evidence that might im-

peach a government witness. *United States v. Bagley*, 473 U.S. 667, 676; 105 S.Ct. 3375; 87 L.Ed.2d 481 (1985). A failure to so notify a defendant violates due process and is cause for reversal of a conviction. *Id.*

In the instant case, the Government admits that Yingling told it that he had been solicited to submit a false bill, but the Government contends that Yingling did not remember who had made the request, that Yingling denied submitting any false bills, and that Yingling did not know of any subcontractor who falsified bills. If this is true, it would not constitute impeachment evidence because Yingling could point to no witness who had solicited inflated bills and, therefore, there is no witness who might have been impeached with this information.

Further, scrutiny of Yingling's recent "deposition" reveals only one potential reference to Norman Tandy, the witness Defendants now challenge.

> Q Did you ever bring to their attention that you could have completed your work for the original contract price?
>
> A I called Tandy in Florida. I asked him who the crooks are who are on the job, I want to know who I can talk to.
>
> Q Okay.
>
> A Are you going to be honest. And they hung up with me.

Yingling Statement at 15. Yingling neither makes it clear that he is speaking of Norman Tandy (the only other reference to a Tandy in the statement is to Gil Tandy, Norman's brother) nor that Tandy indicated any knowledge of requests to "pad" bills.

Thus, while we acknowledge that the Government had a duty to disclose to Defendants any evidence that might have impeached Tandy, nothing in the two proffered statements indicates that the Government had any such knowledge. We conclude that there is no merit to this second argument.

We will issue an appropriate order.

/s/ WILLIAM W. CALDWELL

William W. Caldwell
United States District Judge

Date: September 23, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
	:	
vs.	:	
	:	
SIDNEY COHEN,	:	CRIMINAL NO. 1:CR-92-179-01
JOHN L. "JACK" DADDONA,	:	CRIMINAL NO. 1:CR-92-179-02
Defendants	:	

ORDER

AND NOW, this 23rd day of September, 1993, upon consideration of the Defendants' motions for a new trial based on after-discovered evidence and for reconsideration of our order of July 1, 1993, it is ordered that:

1. A motion for reconsideration filed on July 15, 1993, is denied.

2. The motion for a new trial based on after discovered evidence is denied.

3. In accordance with Fed. R. Crim. P. 58(g) and Fed. R. App. P. 4(b), any appeal of this order must be taken within 10 days of the filing hereof.

/s/ WILLIAM W. CALDWELL

William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
	:	
vs.	:	CRIMINAL NO. 1:CR-92-179-02
	:	
JOHN L. "JACK" DADDONA,	:	
Defendant	:	

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On October 15, 1993, Defendant filed a renewed motion for a new trial, or in the alternative, for leave to take discovery in aid thereof. For the reasons stated, we will deny the motion without awaiting response by the Government.

This is the third motion for a new trial that has been filed in this case. On September 23, 1993, we denied a motion based, as is the current motion, on after-discovered evidence. That motion alleged that the Government failed to disclose to the defense accusations of impropriety made against one of the Government's key witnesses, Norman Tandy.[1] Defendant's present motion points to various "depositions" that purport to bolster the allegation that the Government failed to meet its duty of disclosure.

As we discussed in our order of September 23, 1993, the standard for consideration of a motion for a new trial based on after-discovered evidence is well-established.

1. the evidence must be in fact newly discovered; i.e., discovered since trial;

2. facts must be alleged from which the court may infer diligence on the part of the movant;

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1. Defendant was convicted of mail fraud and conspiracy to commit mail fraud on September 18, 1992, following a five-day trial.

3. the evidence relied on must not be merely cumulative or impeaching;

4. it must be material to the issues involved; and

5. it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Government of the Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985). Here, there is no indication whatever of due diligence in discovering the statements Defendant now proffers. The depositions referred to were available not only at the time the first motion based on after-discovered evidence was filed, but also at the time of trial. To the extent that the motion is for a new trial on grounds other than after-discovered evidence, it is untimely. Fed. R. Crim. P. 33.

Additionally, Defendant appealed from our order of September 23, 1993, on October 4, 1993.[2] We resolved the earlier motion based on after-discovered evidence to allow the United States Court of Appeals for the Third Circuit to consider the conviction as a whole rather than in piecemeal fashion. Defendant's continuing and untimely filings in this court attempt to disrupt that objective.

AND NOW, this 19th day of October, 1993, upon consideration of Defendant's renewed motion for a new trial or, in the alternative, for leave to take discovery, it is ordered that:

1. The motion is denied.

2. Defendant shall make no further filings in this court until the United States Court of Appeals for the Third Circuit has resolved the pending appeals.

/s/ WILLIAM W. CALDWELL

William W. Caldwell
United States District Judge

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2. While we indicated in our earlier memorandum that a district court may consider a motion based on after-discovered evidence during the pendency of an appeal, it is clear that continued filings by this defendant in this case, and in these circumstances, will prevent an efficient resolution of the appeals taken by him and his co-defendant.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-7338 & 93-7683

USA v. Daddona

To: Clerk

1) Motion by Appellant, John L. "Jack" Daddona, to Consolidate the Appeals for All Purposes and to Stay the Briefing Pending the District Court Action on the Motion for a New Trial

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The foregoing Motion is considered. The appeals are consolidated for briefing and disposition. The briefing schedule previously issued in appeal No. 93-7338 is vacated. A consolidated briefing schedule shall be issued. The request to stay the appeals pending disposition by the district court of the motion for a new trial is denied. In the absence of a motion to remand it appears that the district court would lack jurisdiction. *See e.g., United States v. Davis*, 924 F.2d 501 (3d Cir. 1991).

For the Court,

/s/ P. DOUGLAS SISK
Clerk

Dated: October 27, 1993

Filed August 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7338
No. 93-7683
No. 93-7725
No. 93-7351

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN L. "JACK" DADDONA,

Appellant in Nos. 93-7338, 93-7683, and 93-7725.

SIDNEY COHEN,

Appellant in No. 93-7351

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Criminal Action Nos. CR-92-179-01 and -02)

ARGUED MAY 19, 1994

BEFORE: BECKER, LEWIS, *Circuit Judges,*
and IRENAS, *District Judge.**

(Filed August 17, 1994)

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*Honorable Joseph E. Irenas, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

IRENAS, *District Judge.*

Appellants were convicted of various counts of fraud stemming from their attempts to disclaim performance and payment bonds issued in connection with a construction project. Pursuant to U.S.S.G. §2F1.1(b), the trial court determined the amount of loss for sentencing purposes to be in excess of $1,500,000, most of which represented the mortgagee's cost to complete the project after taking it over from the mortgagor/developer. Although the mortgagee was not an obligee under the bonds,

the district court nonetheless concluded that its loss was properly attributable to the appellants' fraudulent conduct.

Appellants raise a number of challenges to their convictions and sentences and to the district court's denial of motions for a new trial. We will affirm the judgments of conviction and the district court's denial of appellants' motions for a new trial. However, because we find that the trial court improperly calculated the losses resulting from the appellants' fraudulent conduct, we will vacate the sentences and remand both cases for resentencing.

I.

FACTS AND PROCEDURAL HISTORY

Appellant Sidney Cohen ("Cohen") was a principal in Green Hill Associates ("Green Hill"), a limited partnership and the developer of the Green Hill Apartment Building Project ("the project") in Susquehanna Township, Pennsylvania. The project was financed by an $8.9 million mortgage loan to Green Hill from the Summit Tax Exempt Bond Fund, L.P. ("Summit"), which in turn was headed by Stuart J. Boesky ("Boesky").

Construction on the project began in July of 1986. By the spring of 1987, the project was substantially behind schedule. Cohen sought to replace the general contractor, Susquehanna Construction Company ("Susquehanna"), with Eastern Consolidated Utilities, Inc. ("ECU"), a building contractor owned and operated by appellant John L. ("Jack") Daddona ("Daddona"). Summit agreed to the substitution, provided ECU obtain performance and payment bonds in the amount of $3 million.[1]

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1. A performance bond guarantees the owner that the general contractor will perform his contract. A payment bond, sometimes referred to as a labor and materials bond, guarantees that the general contractor's subcontractors and materialmen will be paid for their services. The bonds are actually issued in tandem. It should be noted that while Green Hill, as owner, had rights under both bonds, and the subcontractors and materialmen had rights under the payment bond, Summit was not an obligee under either bond. See pp. 18-19, *infra*.

Summit also threatened foreclosure unless the bonds were produced by July 29, 1987.

Daddona consulted Daniel Culnen ("Culnen") of the Culnen & Hamilton Agency ("C & H"), one of the largest independent surety bond brokers on the East Coast and Daddona's long-time insurance agent. He advised Culnen of Summit's demand, and Culnen agreed to issue the bonds through Employers Insurance of Wausau ("Wausau"), for whom he was a registered independent agent. However, as a condition to his agreement, Culnen required that Daddona, Cohen, and their families agree in writing to personally indemnify Wausau for any claims paid on the bonds.[2]

By letter dated June 15, 1987, Culnen advised Summit that in the event ECU were to become the project's general contractor, it would be able to obtain the necessary bonding. Thereafter, on July 6, 1987, Cohen, Daddona, and their families executed an indemnity agreement. On July 20, 1987, ECU and Green Hill entered into a $3.4 million contract for the completion of the project.

On July 27, 1987, Culnen directed his bond manager, Pamela Hayes ("Hayes"), to prepare the bonds on Wausau forms. Hayes prepared the bonds, affixed the Wausau corporate seal, and attached power of attorney forms. Hayes, purportedly at Culnen's behest, did not follow the usual procedure and give the bonds a new number. Rather, she affixed a number that had been used on a previous ECU project and then twice witnessed Culnen's signature under the fictitious name of "B. Adams."

Culnen signed both bonds and delivered them to Daddona along with a cover letter explaining the method of calculating

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2. The requirement that Cohen execute an indemnity agreement was unusual in that it essentially vitiated any benefits that might have inured to Cohen from the bonds. At trial, Culnen explained his concern that Cohen, who had earlier filed what Culnen considered to be specious claims against the bonds held by Susquehanna, would make similar claims against ECU's bonds. The indemnity agreement was expressly designed to prevent Green Hill from filing claims under the bonds.

the bond premium. Although Culnen did have authority to execute and deliver Wausau bonds, he breached his own agreement with Wausau by failing to report his execution and delivery of the bonds and by failing to obtain Wausau's prior approval.

Daddona signed the bonds on July 29, 1987, and forwarded them to Cohen. Cohen witnessed Daddona's signatures on the bonds and directed his attorney, Mitchell Leiderman ("Leiderman"), to forward copies of the bonds to Summit, which Leiderman did on July 30, 1994. Summit halted its foreclosure proceedings, and ECU commenced work on the project in August of 1987.

A. *Padding the Invoice*

In August Culnen prepared and mailed to Daddona an invoice for the bond premiums in the amount of $42,413. Shortly thereafter Cohen called Culnen and instructed him to prepare a new invoice in the amount of $52,413, the difference representing an unrelated $10,000 consulting fee owed by Cohen to Culnen. Daddona indicated that he had no objections to the request.

At Daddona's direction, Culnen forwarded the upwardly revised invoice to Cohen, who submitted it to Summit on October 7, 1987, as part of a monthly requisition. When Summit released the funds to Cohen on October 21, 1987, Cohen immediately forwarded the monies to Culnen and received a check back from Culnen for $10,000 on November 27, 1987.

Culnen retained the remaining $42,413 for a period of time, but was pressured by Cohen and Daddona to divide the money. Consequently, Culnen agreed to give Daddona a $32,413 credit against his outstanding account balance, which was memorialized in a credit memo dated May 11, 1988. On May 16, 1988, Culnen forwarded a second check for $10,000 to Cohen.

B. *Resuming Construction*

Once the new general contractor was in place, Cohen sought to entice the subcontractors, many of whom had left the project

for non-payment, to return to work on the project. At several jobsite meetings conducted in August of 1987, Cohen and ECU employees displayed copies of the bonds and assured the subcontractors that the bonds guaranteed their payment. At least two subcontractors, Thomas Strawbridge and Robert Yingling, subsequently executed contracts with ECU for work on the project. Copies of the bond were also mailed to Les Stewart ("Stewart") of York Excavating Company ("York"), thereby inducing him to return to work.

C. *Disclaiming the Bonds*

By the end of 1987, the project was still behind schedule, and Summit was again threatening foreclosure. In or around December of 1987, Cohen and Daddona returned the original bonds to Culnen without informing Summit or the subcontractors.[3] By January of 1988, most of the subcontractors had left the site for non-payment, and on February 5, 1988, Summit commenced foreclosure proceedings.

In a settlement reached on April 8, 1988, Summit agreed to pay Green Hill $216,000 less the amount of any unpaid subcontractor bills then due and owing on the project. In return, Green Hill agreed to deed the project to Boesky's nominee, Green Hill Investors,[4] to assign to Summit Green Hill's rights (but not its obligations) in the contract with ECU, and to escrow Cohen's beneficial interest in the bonds to pay off liens

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3. While it may be that Cohen or Daddona thought that by returning the original bonds to the issuer they were limiting the rights of potential claimants, and thereby their indemnity obligations to Wausau, there is no legal basis for concluding that the rights of parties who entered into contracts or performed labor in reliance on the bonds could have their rights unilaterally terminated in this manner. Indeed, the indictment itself was premised, at least in part, on the validity of the bonds. If the bonds were in fact not valid when issued, there could be no fraud in disavowing them.

4. For convenience, we will refer to Summit and Green Hill Investors collectively as "Summit."

that might accrue on the property in the four months following the settlement.[5]

In March, Wausau began to receive claims on the payment bond. On March 16, 1988, the attorney for the International Brotherhood of Electrical Workers Union ("IBEW") filed a claim against the bond with Wausau's home office in Wisconsin and forwarded copies to Cohen and Daddona. On March 21, 1988, Jack Meyers ("Meyers") of Construction Management Corporation ("CMC") also made a claim by sending a copy of the claim letter to Wausau's regional bond manager in Totowa, New Jersey, Ken Gelok ("Gelok"). CMC and York filed formal claims against Wausau on April 14, 1988.

Gelok was surprised by the claims. Company policy required both regional manager and home office approval prior to the issuance of any bonds in excess of $750,000. Gelok knew nothing of the bonds and called Culnen on or about March 25, 1987, to clarify the situation. Culnen advised Gelok that the claims were not valid because he had the cancelled bonds in his possession.

At a meeting in Culnen's office on March 29, 1988, Culnen delivered the bonds to Gelok and falsely assured him that the bonds were not valid, that he had never signed them, and that someone else — perhaps Meyers — had forged his signature. Culnen repeated this tale in a letter dated April 15, 1988, in which he advised Gelok that the bonds were forgeries and that York's and CMC's claims were "phoney claims filed by crooks who probably stole blank forms and forged [Culnen's] signature."

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5. The four-month escrow period tracked the Pennsylvania statute of limitations for the filing of mechanic's liens. 49 P.S. § 1502. It is clear that Green Hill's assignment was strictly limited to the possible liability to existing unpaid subcontractors who were either known at the closing or who filed claims within four months. The essence of the settlement was that Summit's nominees would take the project free and clear of any existing claims of ECU's subcontractors. In fact, those debts were paid by deductions from the $216,000 owed to Green Hill, and Summit's limited rights under the four-month escrow period were never exercised.

On April 20, 1988, Gelok again met with Culnen at the latter's office. During the course of the meeting, Gelok advised Culnen that he had been unable to contact Cohen to confirm Culnen's story about the bonds. Culnen then picked up the telephone, dialed some numbers, and handed the phone to Gelok. A man who identified himself as Sidney Cohen informed Gelok that "there was no bond in force, there never was and there never would be." Daddona App. at 325. The man also advised Gelok that the bonds on which Meyers' and Stewart's claims were based were forgeries, and that Meyers may have been the one who forged Culnen's signature.

On April 22, 1988, Culnen wrote a second letter to Gelok, in which he informed Gelok that he had contacted Daddona, then on a hunting trip in Alaska, and "the conclusion we [*i.e.*, Culnen and Daddona] came to is . . . that Meyers signed the bond form, which was blank, in Jack's office pending finalization of negotiations with the owner." Daddona App. at 223-24. Relying on the letters from Culnen and Gelok's conversation with Cohen, Wausau advised Meyers by letter dated April 20, 1988, that no Wausau bonds existed on the Green Hill project. Thereafter, on April 26, 1988, Wausau issued a second letter, denying Stewart's and Meyers' bond claims on the grounds that no valid bonds existed for the project. On May 6, 1988, Wausau denied the IBEW claim.

On June 16, 1988, Summit, while in the midst of hiring a new general contractor, sent a letter to Wausau inquiring about the status of the bonds. Culnen advised Wausau by letter dated June 21, 1988, that he had neither executed nor delivered the bonds. Wausau subsequently advised Summit on June 27, 1988, that no bonds existed on the project. On September 30, 1988, Summit filed a formal claim against the bonds, in which it alleged that ECU's failure to perform had cost it $3 million in damages. The claim was denied by Wausau in a letter dated October 7, 1988. The letter recited that no valid bonds existed on the project, and that even if there were valid bonds, Summit was not a proper claimant.

D. *The Unravelling of the Scheme*

In July of 1988, Meyers contacted the United States Postal Inspectors, prompting an investigation into the project. On August 5, 1988, grand jury subpoenas were served on Pamela Hayes and C & H. On October 13, 1988, Culnen admitted to Wausau that he had indeed executed and delivered the bonds in July of 1987 and that they were not forgeries. Culnen and C & H were indicted in June of 1991. In November of 1991, Culnen entered into a plea agreement by which he agreed to plead guilty to two counts of mail fraud and cooperate with the government in its investigation of Cohen and Daddona.

Appellants were indicted in July of 1992 and charged with conspiracy to commit mail fraud and two counts of mail fraud. In addition, Cohen was charged with conspiracy to transport a fraudulently obtained security (the $52,413 check issued by Summit for the inflated bond premium), interstate transportation of a fraudulently obtained security, and interstate transportation of a mail fraud victim. The frauds on which the indictment was based were threefold: (1) a fraud on Wausau in not reporting the issuance of the bonds or the receipt of premiums therefor; (2) a fraud on Summit by inflating the invoice for the bond premium to cover an unrelated indebtedness to C & H; and (3) a fraud on potential bond claimants by first returning the original bonds for attempted cancellation and then claiming that the signatures were forgeries.

A five-day joint trial of the appellants was held from September 14-18, 1992. The jury convicted both men of conspiracy to commit mail fraud and of the two counts of mail fraud. The jury also convicted Cohen of interstate transportation of a fraudulently obtained security, but acquitted him of conspiracy to transport a fraudulently obtained security.[6]

On September 25, 1992, appellant Cohen moved for a new trial and, in the alternative, for a judgment of acquittal. That same day, appellant Daddona filed motions to set aside the

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6. The charge of interstate transportation of a fraud victim was dismissed by the judge during the trial.

verdict and for a new trial. In October, both parties filed motions for a new trial based on newly-discovered evidence. All of these motions were denied by memorandum and order dated January 25, 1993.

Appellant Daddona subsequently filed two additional motions for new trial on the grounds of newly-discovered evidence, which were denied by the district court initially and on reconsideration. Each of the motions was followed by a motion to this Court to remand the matter back to the district court, which were also denied.

E. *The Sentencing*

The presentence reports prepared by the U.S. Probation Office set each appellant's base offense level at 6, applying U.S.S.G. §2F1.1.[7] Then, relying on the findings of fact made by the court during the Culnen sentencing, the probation officer calculated the approximate amount of losses to the victims to be $1,562,500.[8] Pursuant to U.S.S.G. §2F1.1(b)(1)(j), he recommended a nine-level increase to the base offense level. The probation officer also recommended a two-level increase for more than minimal planning under U.S.S.G. §2F1.1(b)(2)(A).

All sides objected to the offense level calculation. Cohen contended that the losses claimed were either erroneous, not

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7. Counts 2 (transportation of a fraudulently obtained security), 3 (conspiracy to commit mail fraud), 4 and 5 (mail fraud) were counted as a single offense pursuant to U.S.S.G. §3D1.2(d).

8. *See* Presentence Report of John L. Daddona at 14; Presentence Report of Sidney Cohen at 14:

> The monetary losses caused by the offenses are $1,562,500. This amount is based on the Court's finding regarding losses in the case of Daniel J. Culnen (Dkt. #1:CR-91-105-001). In the Court's sentencing memorandum in the Culnen case, filed on July 30, 1992, it was determined that for the purposes of sentencing, approximate losses to victims were as follows:
>
> | | |
> |---|---|
> | Summit Bond Tax Exempt Fund, L.P. | $1,500,000 |
> | Construction Management Corporation/Aljohn, Inc. | 53,000 |
> | Yingling Construction Company | 9,500 |
> | | $1,562,500 |

covered by the bonds, or settled prior to sentencing. Daddona insisted that he was ignorant of any wrongdoing in the issuance of the bonds, and could not therefore be held accountable for losses incurred. In the alternative, Daddona argued that Summit's losses could not be included in the calculation, as Summit was not a co-obligee on the bond. The government, on the other hand, objected to the lack of a two-point enhancement to Cohen's offense level for obstruction of justice.

Loss hearings were held on March 30 and April 2, 1993. The government proffered the testimony of Norman Tandy, of Norman Tandy & Associates, the company hired by Summit to oversee the completion of the project.[9] Tandy essentially undertook a "cost of completion" analysis — examining the Summit invoices for the period after Eastern left the project site to determine how much more Summit spent because of the Eastern default, then subtracting the cost of changes to the project specifications and the amount of the original Eastern contract. He concluded that Summit had suffered losses of $1,524,761 as the result of appellants' fraudulent conduct.

Appellant Daddona offered rebuttal testimony from S. Leonard DiDonato of Hill, International, who was qualified as an expert construction analyst. DiDonato independently reviewed Summit's records and Tandy's calculations, indicating places where he believed Summit had overspent or Tandy had overestimated the amount of loss. From these he concluded that Summit could have completed the project for $141,719 less than the Eastern contract price, and hence had suffered no loss.

The trial court resolved the various objections to the presentence report in a memorandum dated April 13, 1993. Most of the discussion focused on the amount of loss that properly could be attributed to the defendants' fraudulent conduct. Recognizing that each of the experts were "less than fully objec-

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9. Tandy did not testify in person at the loss hearings. Rather, the government moved to supplement the record by incorporating the testimony Tandy had given at the sentencing hearing for Daniel Culnen, which motion was granted on March 9, 1993.

tive," the court set out to determine who was the more reliable. It noted that Tandy's calculations had been adopted at the Culnen sentencing and therefore had some indicia of reliability. The court also contrasted the "carefully and specifically enumerated" deductions of Tandy with the "speculative and repetitive deductions" and "artificial numbers" used by DiDonato.

The Court found Tandy's testimony to be more dependable, and adopted the figure of $1,524,761 as the amount of Summit's loss and $1,568,830 as the total loss for sentencing purposes.[10] However, the court declined to impose a two-level increase for more than minimal planning and denied the government's request for a two-level enhancement to Cohen's offense level for obstruction of justice. The decision left each appellant with an offense level of 15 and a criminal history category of I, resulting in a sentencing range of 18 to 24 months. On application of the appellants, the courts granted a downward departure and sentenced appellants to nine-month terms of imprisonment.[11]

II.

LEGAL ANALYSIS

Both appellants challenge their judgments of conviction and sentences, and Daddona also appeals the district court's denial of his second and third motions for new trial. We have appellate jurisdiction pursuant to 28 U.S.C. §1291 over final orders of a district court and jurisdiction pursuant to 18 U.S.C. §3742 to review sentences imposed under the United States Sentencing Guidelines.

Appellants' challenges to their convictions and to the district court's denial of Daddona's new trial motions are without

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10. The court also found that Wausau had incurred $44,069 in legal fees as a result of the fraud. It did not, however, address the claims of the other subcontractors, concluding that Summit's loss alone was sufficient to place defendants in the $1-$2 million range.

11. Appellants are out on bail pending appeal.

merit.[12] However, their claims regarding the calculation of their sentences require further analysis.

A. *The Standard of Review*

"When reviewing the sentencing decisions of the district courts, '[w]e exercise plenary review over legal questions about the meaning of the sentencing guidelines, but apply the deferential clearly erroneous standard to factual determinations underlying their application.'" *United States v. Fuentes*, 954 F.2d 151, 152-53 (3rd Cir.), *cert. denied*, _____ U.S. __, 112 S. Ct. 2950, 119 L.Ed.2d 573 (1992), *quoting United States v. Inigo*, 925 F.2d 641, 658 (3d Cir. 1991).

Under the Sentencing Guidelines, the base offense level for fraud is six, U.S.S.G. §2F1.1(a), which must be increased according to the size of the loss attributed to the fraud. U.S.S.G.

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12. Daddona's claims included the following: (1) the evidence was insufficient to support his convictions; (2) the trial court erred in denying appellant's motion for a new trial based on an alleged *Brady* violation without conducting an evidentiary hearing; (3) the trial court erred in admitting certain government exhibits and testimony; (4) the trial court erred in allowing the government to use a summary chart during its closing arguments; (5) the trial court erred in submitting the indictment to the jury, in drafting the verdict form, and in answering a question from the jury; and (6) the trial court improperly allowed the government to question Daddona about a "check-swapping" arrangement.

Cohen's claims included the following: (1) the trial court erred in denying appellant's motion for new trial based on an alleged *Brady* violation without conducting an evidentiary hearing; (2) the evidence was insufficient to support his convictions; (3) the trial court erred in permitting the introduction of an "inaccurate and fabricated 'closing statement'"; (4) the trial court erred in allowing the government to use a summary chart during its closing arguments; (5) the trial court erred in submitting the indictment to the jury, in drafting the verdict form, and in answering a question from the jury; (6) the trial court improperly permitted evidence of a "check-swapping" arrangement; and (7) the trial court erred in incorporating by reference testimony from the Culnen sentencing hearing.

Cohen also challenged the failure of the district court to depart downward, either based on his acceptance of responsibility or on his age and infirmity. However, because on remand the district court is free to revisit the issue of departures from the properly calculated sentencing range, we need not consider these claims here.

§2F1.1(b). Because appellants challenge the district court's interpretation of the "loss" concept in §2F1.1(b), our review is plenary. *See Kopp*, 951 U.S. at 526; *United States v. Bierley*, 922 F.2d 1061, 1064 (3d Cir. 1990).

B. *Calculating the Amount of Loss for Sentencing Purposes*

The version of U.S.S.G. §2F1.1(b) in effect at the time the offenses were committed set forth the following method of adjusting the offense level:

> (1) If the loss exceeded $2,000, increase the offense level as follows:
>
> | Loss | Increase in Level |
> |---|---|
> | . . . | |
> | (G) $ 100,001 – $ 200,000 | add 6 |
> | (H) $ 200,001 – $ 500,000 | add 7 |
> | (I) $ 500,001 – $1,000,000 | add 8 |
> | (J) $1,000,001 – $2,000,000 | add 9 |
> | . . . . | |

U.S.S.G. §2F1.1(b) (Nov. 1987); *see generally* U.S.S.G §2B1.1, commentary at 2 ("'Loss' means the value of the property taken, damaged, or destroyed.").[13] The district court found the total loss for sentencing purposes to be $1,568,830. U.S.S.G. §2F1.1(b). Appellants assert, and we agree, that the losses claimed by Summit were not caused by their fraudulent activity and should not have been included in the U.S.S.G. §2F1.1 calculation.

C. *Cost to Complete as a Measure of Loss*

It should be noted at the outset that we do not question the

13. Although it is proper to use the Guidelines in effect at the time of sentencing, *see* U.S.S.G. §1B1.11(a), application of the version of §2F1.1 contained in the November 1992 *Guidelines Manual* would have resulted in the imposition of more severe penalties. The district court and the probation officer therefore properly applied the Guidelines in effect at the time of the offense. *See* U.S.S.G. §1B1.11(b).

district court's factual determination that Summit's cost to complete the Green Hill project exceeded $1,500,000. The trial judge heard extensive testimony on that issue and his factual determination finds more than adequate support in the record. What the record does not contain is any indication that this loss was due to the fraud of the appellants rather than the obvious failure of two general contractors, Susquehanna and ECU, to fulfill their contractual obligations in a timely fashion.

Culnen was a registered independent agent of Wausau with actual and apparent authority to execute and deliver surety bonds. While there may have been fraud in the failure to advise Wausau of the issuance, in the inflated invoice, in their redelivery to Culnen, and in the effort to mislead possible obligees concerning their validity, the fact remains that the bonds appear to have been validly issued and enforceable by any proper obligee who relied on their issuance.[14]

Under Pennsylvania law, a principal is liable for the acts of its agent committed in the scope of its employment, even though the principal did not authorize the act. *Aiello v Ed Saxe Real Estate, Inc.*, 508 Pa. 553, 499 A.2d 282 (1982); *see also Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Insurance Comm'r of the Commonwealth of Pennsylvania*, 121 Pa. Cmwlth. 618, 551 A.2d 368 (Pa. Commw. Ct. 1988). Thus, to the extent that Summit (or any other claimant) has any rights under the bonds, either initially or pursuant to later agreements, those rights would continue to exist.

Although Summit was the project lender, it was not a named obligee under either the performance or payment bonds as

14. In a recent decision from the Middle District of Pennsylvania, *York Excavating Co., Inc. v. Employers Insurance of Wausau*, No. CV-91-1037 (M.D. Pa. Oct. 21, 1993) (Memorandum Opinion of Hon. James F. McClure, Jr., U.S.D.J.), the court denied claims brought by one of the project subcontractors against the Wausau bonds for work done pursuant to written and oral agreements entered into in 1987. However, the decision was not premised on the validity of the bonds, but rather on the validity of York's claims. The court found insufficient evidence of an oral agreement with ECU. Furthermore, the court found that since ECU was not a party to the written contracts by which York agreed to perform work, York could not collect under the Wausau bonds.

they were initially issued. Green Hill was the obligee on the performance bond, while the payment bond named as obligees only those

> having a direct contract with [ECU] or with a subcontractor of [ECU] for labor, material or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.

York Excavating, slip. op. at 13.

There is also indication in the record that Summit was aware that it was not an obligee when it agreed to accept ECU as the new general contractor. Daddona App. at 259. Of course, a lender benefits indirectly by the existence of a performance or payment bond in favor of the owner and subcontractors. However, because of the Cohen family indemnity, it is clear that Green Hill, controlled by Cohen, would have been reluctant to exercise its rights under the bonds. However, the indictment in this case does not charge the existence of this indemnity as an act of fraud, nor did Summit insist in April of 1988, when negotiating the foreclosure settlement, that Green Hill exercise its rights under the bonds. The record is clear that Summit feared a protracted foreclosure battle and wanted a quick settlement to take control of the project.

It is equally clear that Green Hill's assignment and escrow of the bonds was limited to guaranteeing that existing debts to subcontractors were paid by Green Hill.[15] There is nothing in the record to suggest that Summit ever had to pay debts to subcontractors that were outstanding at the time it took over

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15. The Escrow Agreement specifically provides in the first paragraph that the bonds shall be held

> for the benefit of [Summit] until such time as there are no mechanics liens filed against the Project resulting from events that occurred prior to the date hereof . . . provided, however, that in the event no Mechanics Liens have been filed against the Project by August 10, 1988, then this Escrow Agreement shall automatically terminate.

Cohen App. at 330a.

the property. When Wausau denied Summit's bond claim on October 7, 1988, there is no indication that Summit thereafter took any legal action against Wausau, notwithstanding the significant amount at issue.

It does not appear from the record before us that Summit was harmed in any way by the issuance of the bonds. Nor can we say that Summit was harmed by the efforts of Cohen, Daddona, and Culnen at various times to deny the existence of the bonds. As previously noted Summit has no direct rights under the bonds as a named obligee, and its rights as assignee of Green Hill in the settlement of April, 1988, were not only sharply limited, but also unnecessary since the condition of the escrow was satisfied.

A recent decision from the Seventh Circuit offers insight into the issue of measuring damages for sentencing purposes in a fraud case. The appellant in *United States v. Marlatt*, 24 F.3d 1005 (7th Cir. 1994), owned a title company which sold title insurance underwritten by Ticor Title Insurance Company ("Ticor"). Marlatt purchased a resort hotel and converted it into time-shared condominium units. With each unit sold, he issued a title insurance policy underwritten by Ticor. However, while the policies represented clear title to the units, the titles were in fact heavily encumbered. When Ticor discovered this, it spent $476,000 to clear the titles. Later, in response to the threat of lawsuits from the purchasers of the condominiums, Ticor spent an additional $565,000 to repurchase all of the units sold.

Marlatt pled guilty to one count of mail fraud and one count of making false statements to the Department of Labor. In determining the amount of loss pursuant to U.S.S.G. §2F1.1(b), the district court included both the money spent clearing the title and the money spent repurchasing the units, presumably concluding that both were elements of the loss caused by the fraud. The Seventh Circuit vacated the sentence, even though it conceded that the expense of repurchasing the units might be considered as having been caused by the appellant's fraud, in the sense of "but for" causation:

> Even if it had been, it was not chargeable to the defendant under section 2F1.1 of the guidelines. Application Note 7(b) distinguishes between loss on the one hand and consequential and incidential damages on the other and makes it clear that with irrelevant exceptions the latter two items are not to be counted in computing the loss for purposes of sentencing under this guideline. The reason for that distinction is no doubt to prevent the sentencing hearing from turning into a tort or contract suit. The distinction is nicely illustrated by this case. The defendant extracted from Ticor by fraud a bunch of insurance policies on which Ticor was required to make good to the tune of $476,000. In the wake of the loss Ticor incurred other expenses, which were consequences, perhaps even forseeable consequences, of the fraud, but were not the thing actually taken from Ticor. . . .

Id. at 1007-08 (citations omitted).

Other circuits have likewise drawn a distinction between losses that were directly caused by the fraud and "consequential and incidental damages." *See, e.g., United States v. Newman*, 6 F.3d 623, 630 (9th Cir. 1933) ("[The measure of loss] does not include consequential losses. If the Sentencing Commission had intended to include consequential losses, it would have included them in the definition of loss"); *United States v. Wilson*, 993 F.2d 214, 217 (11th Cir. 1993) ("The phrase 'property taken, damaged or destroyed' does not allow for inclusion of incidental or consequential injury, and it is error to rely on evidence of such injury in calculating loss when the value of the property may be ascertained."), *citing United States v. Thomas*, 973 F.2d 1152, 1159 & n.9 (5th Cir. 1992); *cf. United States v. Stanley*, 12 F.3d 17, 20-21 (2d Cir. 1993).

While it may be that Summit's excess cost to complete the project is in some sense a consequence, at least in part, of its involvement with Cohen and Daddona, this loss is "not the thing actually taken" from Summit as a result of their fraudulent activities.

We do not mean to suggest that no financial losses were incurred by the fraudulent activities of the appellants. Wausau

has suffered actual harm in the form of legal expenses, and potential harm in the form of possible claims against the bond. Some of the subcontractors and materialmen who were covered by the payment bond may also have suffered losses, although only a few claims have surfaced and one of the largest has been recently rejected by the Middle District of Pennsylvania.

Whatever losses Summit or others may have suffered from appellant's fraud, Summit has not demonstrated any losses which can fairly be measured by its cost to complete the project, and it was therefore error for the district court to incorporate Tandy's calculations into the U.S.S.G. §2F1.1 determination of the loss caused by the fraud. The sentences will be vacated, and the matter remanded to the district court for resentencing.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed September 29, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-7338, 93-7351, 93-7682/83 and 93-7725

UNITED STATES OF AMERICA

v.

JOHN L. "JACK" DADDONA
Appellant in Nos. 93-7338,
93-7683 and 93-7725

UNITED STATES OF AMERICA

v.

SIDNEY COHEN,
Appellant in Nos. 93-7351
and 93-7682

Present: BECKER and LEWIS, *Circuit Judges*,
and IRENAS, *District Judge**

ORDER

It appearing that although it was the intention of the Court to affirm the order appealed in No. 93-7682 in the opinion and judgment entered August 17, 1994 in appeal Nos. 93-7338, 93-7351, 93-7683 and 93-7725, *see* slip opinion at 12 n.12, due to a clerical error that docket number was not listed. It is hereby O R D E R E D that the caption of the August 17, 1994 opinion and judgment is amended to include docket No. 93-7682. It is further O R D E R E D that the certified judgment in lieu of formal mandate in No. 93-7682 shall issue forthwith.

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*Honorable Joseph E. Irenas, United States District Judge for the District of New Jersey, sitting by designation.

By the Court,

/s/ Joseph E. Irenas
District Judge

Dated: September 29, 1994

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

MR. DANIEL: The government calls Mitchell Leiderman.

MITCHELL R. LEIDERMAN, called as a witness being duly sworn, testified as follows:

THE CLERK: For the record please state your full name.

THE WITNESS: Mitchell R. Leiderman.

THE CLERK: Please spell your last name.

THE WITNESS: L-e-i-d-e-r-m-a-n.

THE CLERK: Thank you, sir.

DIRECT EXAMINATION

BY MR. DANIEL:

Q Mr. Leiderman, what is your occupation?

A I'm an attorney.

Q How long have you been an attorney?

A Since 1980.

Q Licensed here in Pennsylvania?

A Yes, I am.

Q Where is your office?

A Media, Pennsylvania, Delaware County.

Q In 1987 where was your office?

A Lansdale, Pennsylvania, Montgomery County.

Q Was it also located in Lansdale in 1988?

A Yes.

Q And the name of your firm?

A The firm at that time which I was employed by was Hunn, Shelly & Samel.

Q That's in 1987 and 1988?

A Through October of 1988.

Q Sir, do you know Sidney Cohen?

A Yes, I do.

Q And did you represent him in 1987?

A Yes, I did.

Q And did you represent him in connection with the Green Hill Project?

A Yes, I did.

Q And, sir, who was Stuart Boesky?

A Mr. Boesky I think is the executive vice-president of an organization called Summit Tax Exempt Bond Fund.

Q Mr. Boesky and Summit being the lenders for the project?

A Yes, they were.

Q Sir, did you ever forward copies of $3 million Wausau bonds to Mr. Boesky?

A Yes, I did.

Q When was that, sir?

A I think it was in July of 1987 prior to the signing of the construction contract.

Q Did you forward copies or originals?

A Copies.

Q Where did you get the copies that you forwarded to Mr. Boesky?

A They were provided to me by my client, Mr. Sidney Cohen.

Q When did he give them to you?

A The same day I forwarded them to Mr. Boesky.

Q Where did he give them to you?

A I think they were given to me at my office in Lansdale, Pennsylvania.

Q He gave them to you there?

A I don't know if it was given to me personally. I can't remember to be perfectly honest with you. This is over five years ago. I know I received them at my office at Lansdale and I don't remember if Mr. Cohen personally handed them to me.

Q I show you what's marked as Government's No. 36. Is that the letter that you sent to Mr. Boesky with the copy of the $3 million Wausau bonds?

A Yes, it is.

Q The date of the letter, sir?

A It is July 30, 1987.

Q Would that have been the date that you sent them to him?

A It would be because I believe it was sent Federal Express because the letter says it was sent via Federal Express.

Q Did you ever see the originals?

A No.

Q At no time?

A No. At no time have I seen the originals to this day.

Q Sir, did you also represent Mr. Cohen during — well, let me ask you this, did you also represent Mr. Cohen in March of 1988?

A Yes, I did.

Q Sir, I want to direct your attention to specifically to March 17, 1988. Did you have a conversation with "Jack" Daddona that day?

A I had a conversation with "Jack" Daddona and other people that day, and the only reason I remember this is because you have shown me a document previously dated that day. I — really it was such an inconsequential conversation that I had forgotten it until you showed me the document that you showed me.

Q What do you remember about your conversation with Mr. "Jack" Daddona on that day?

A Well, I remember, first of all, why I had the conversation. I had received a telephone call from Mr. "Jack" Meyers who was making very wild —

Q Please, Mr. Leiderman.

A I'm sorry.

THE COURT: Just answer the question.

BY MR. DANIEL:

Q What Mr. Daddona told you in that conversation that you had with him that day.

A Mr. Daddona didn't tell me anything in that conversation. In regard to what, could you be specific? I'm not trying to be coy. I just really would like to know what you want.

Q Did you have a conversation with Mr. Daddona that day about the $3 million Wausau bonds?

A Yes, I did.

Q Would you tell this jury what Mr. Daddona told you about the $3 million Wausau bonds on March 17, 1988?

A He spoke in regard specifically to the performance bond, and he told me that that — basically he didn't tell me anything about them. He just said that Sid — effectively that Sid Cohen should not make a claim on those bonds.

Q Well, I'm not sure I understand your answer, Mr. Leiderman. First you said he did talk to you about the bonds, then you said he didn't.

A He talked to me about the bonds. He talked to me about the performance bond.

Q Did he say anything about the bonds other than a reference to Mr. Cohen?

A He said nothing about the bonds other than the fact [of] the reference to Mr. Cohen.

Q Did he say anything about the manner in which they were obtained?

A No, he did not.

Q Did he say anything about their validity, anything?

A No, he did not.

Q Did he infer anything about their validity?

A He didn't infer, I did.

Q Well, —

A Incorrectly, I might add.

Q What did Mr. Daddona say about the bonds that made you infer something about their validity?

A He said nothing. I'm not trying to be coy. If you'd like me to answer more elaborately, I will be glad to.

Q Could you explain your answer? You said that you inferred something based on what he said about their validity. Now I'd like to know what he said that —

A First of all — go ahead, I'm sorry.

Q — that made you infer that they were not valid? Please let me finish the question.

A I'm sorry, I have that tendency. I do apologize for that.

Q What did Mr. Daddona say to you that made you infer that it was something about the bonds validity?

A He said nothing.

THE COURT: The witness didn't say that he inferred it because of something Mr. Daddona said. He said he inferred it.

THE WITNESS: That I inferred it.

THE COURT: You inferred it but not based on what Mr. Daddona said?

THE WITNESS: Exactly, Your Honor.

BY MR. DANIEL:

Q. Well, what did Mr. Daddona tell you that day?

A He told me what I said previously in regard to Mr. Cohen making a claim on the bond.

Q Did he say anything more than that?

A No.

Q Do you remember everything about that conversation?

A If you want me to honestly answer, no, I can't remember everything about anything that happened five years ago, but I do remember the conversation. If you'd like me to explain what went on in more elaborate detail, I will be glad to.

Q I would like you to answer my question.

A Be glad to.

Q Did you prepare a memorandum regarding what Mr. Daddona said to you that day?

A I prepared a note to the file, yes.

Q And did you prepare that memorandum at or about the time that Mr. Daddona made the remarks?

A I would imagine, sir, I usually did. That was my custom.

Q And what did you do with the memorandum?

A After I completed both items on that memorandum I stuck it in the file and never even thought about it again.

Q Let me show you what's marked as Government's No. 237. Is that the memorandum that you prepared regarding Mr. Daddona's comment to you that day?

A Yes, it is. It appears to be.

Q And the date on the memorandum at the top?

A It appears to be either March 16 or March 18 of 1988. I can't make out the date.

Q All right, and, sir, would you read the first paragraph please.

A On 3-17-88 MRL met with "Jack" Daddona of ECU. He, through innuendo, made accusations that the performance bond provided to Green Hill by ECU and then by Green Hill to Summit Tax Exempt Bond Fund —

THE COURT: Mr. Leiderman, you're an attorney. Please read it so the jury can listen to you and understand.

A I'll start it again, Your Honor. On 3-17-88 MRL met with "Jack" Daddona of ECU. He, through innuendo, made accusations that the performance bond provided to Green Hill by ECU and then by Green Hill to Summit Tax Exempt Bond Fund was in some way not valid and was not obtained legitimately. He provided no proof and would not state this directly.

BY MR. DANIEL:

Q Thank you. Your memo starts out on 3-17-88 MRL. What does MRL stand for?

A That's me, Mitchell Roy Leiderman.

Q Where did — did you have a meeting with "Jack" Daddona that day?

A Yes, I did.

Q Where did you meet him?

A I don't remember.

Q Your memo reads: He, through innuendo, made accusations that the performance bond provided to Green Hill by ECU and then by Green Hill to Summit Tax Exempt Bond Fund —

MR. HEIDECKER: Objection, Your Honor. He's reading again what's already been read.

BY MR. DANIEL:

Q. My question — let me restate the question. It references ECU. What is ECU, sir?

A ECU, Eastern Consolidated Utilities.

Q Was in some way not valid and it was not obtained legitimately. My question to you, sir, is what specifically having now read this, do you recall anything specifically that Mr. Daddona said to you along these lines?

A He said absolutely nothing along those lines. I inferred it from body language and the fact that Mr. Daddona appeared to be evasive and defensive when I spoke to him. That's why the second part of that memo includes a conversation with my client where I verified the validity of the bonds.

Q Mr. Leiderman, please, —

A I'm sorry.

Q — please answer my questions.

A I'm trying to.

Q I am not sure I understand you. Are you saying that Mr. Daddona actually said nothing whatsoever, uttered no words?

A Uttered no words about the validity of the bonds absolutely.

Q He uttered no words about the validity of the bonds, it was just body language?

A Absolutely. You have got to understand, this memo was written for my use only, it wasn't written for any other purpose, and it verified that I had spoken to Mr. Daddona and Mr. Cohen, that's all.

Q It was for your use only, sir?

A Absolutely.

Q You didn't want anybody else to know?

A I wrote hundreds of memos like that for my — to refresh my recollection in every one of the files that I dealt with.

Q What body language did he engage in that made you write this memorandum?

A He wouldn't look me in the eye and he didn't answer questions directly.

Q Did you ask him if the bond was valid?

A Excuse me?

Q Did you ask him if the bond was valid?

MR. RECCHUITI: Your Honor, I am now going to object. This seems to be leading to me.

THE COURT: No, that's a fair question.

A I'm sorry, I didn't really hear the question. Did I ask him what, if the bond was what? The last word I didn't hear you.

BY MR. DANIEL:

Q Valid.

A Valid? Yes, I did ask him if the bond was valid.

Q What did he say?

A That Sid Cohen should not — his is the performance bond only, that Sid Cohen should not make a claim on the bond.

Q What did — you also wrote that it was not obtained legitimately. Did you ask him whether it was obtained legitimately?

A I don't think I asked him that specifically, that I meant not obtained legitimately as to Sid Cohen, but he never said that.

Q Sir, did you also represent Mr. Cohen in a settlement with Summit on April 8, 1988?

A Yes, sir, I did.

Q And as part of that settlement agreement were certain bond assignment documents executed by Mr. Cohen?

A Yes, they were.

Q Did you participate in the execution of those documents?

A Personally executing them, no, I did not, not that I can remember. I don't think I witnessed anything.

Q Did you have any contact with the attorneys for Summit regarding those bond assignment forms that day?

A That day certainly.

Q Did anyone ask you to see the original bonds that day?

A No, they did not.

Q Did you see the original bonds that day?

A No, I did not. In fact I previously testified I have never seen the original bonds.

Q Sir, did you know anything about the bonds being returned?

A No, sir, I did not.

Q Sir, did you tell anyone at Summit or any of Summit's attorneys on April 8, 1988 about the conversation you had with Mr. Daddona on March 17?

A No, I did not, and the reason I did not is I investigated and found it to be —

Q Just — Mr. Leiderman, please just answer the question.

MR. HEIDECKER: Your Honor, let him —

THE COURT: No, I think the answer should be responsive to the question. You'll have an opportunity for cross examination to explore any areas you think should be gone into.

BY MR. DANIEL:

Q Now, Mr. Leiderman, after you had this conversation with Mr. Daddona on March 17 what did you do?

A I immediately contacted my client Sidney Cohen.

Q And did you tell him what Mr. Daddona said and what he did?

A I told him that Mr. Daddona had said that Sid Cohen shouldn't file a claim on the bond. I also told him that I had inferred something from Mr. Daddona's language, body language and demeanor, that he was being evasive, is there anything wrong with the bonds?

Q You asked that of Mr. Cohen?

A Yes, I did.

Q And what did he tell you?

A He said absolutely not. He participated in negotiating and purchasing the bonds, that he personally was aware of the fact that the bonds were valid and that they had been obtained through Wausau's authorized agent, Dan Culnen, who was authorized to issue the bonds.

Q Did you record Mr. Cohen's comments in your memo?

A Yes, I did on the same page as the notes I made about my conversation.

Q And do the words absolutely not appear in the memo?

A I didn't record exact words. I never do in those circumstances. This is notes to jar my memory if nothing else. This is not meant to be introduced in evidence.

Q Let me ask you to read the second paragraph of your memorandum.

A I then telephoned Sid Cohen in regard to these allegations. Sid informed me that as far as he was concerned the bond was valid, that he paid Dan Culnen $54,000 for the bond and that Dan was a valid agent for Wausau Insurance Company, the issuer of the bond, and that the bond was issued by Wausau.

Q Did he use the specific words, Mr. Leiderman, as far as he was concerned?

A No, I can't remember what the specific words were, and I certainly do not put down specific words. I don't quote people in this. I just make notes to jar my memory. That's all that is.

Q You don't — okay, just so I understand you, you wrote that as far as he was concerned, the he that you're talking about is Sidney Cohen, correct?

A Right. Those are my words, not his.

MR. DANIEL: I have no other questions.

THE COURT: All right, Mr. Recchuiti.

CROSS EXAMINATION

BY MR. RECCHUITI:

Q You represented Mr. Cohen from the inception at least or maybe before his dealings with Mr. Boesky up to and including April 8 of 1988, is that correct?

A That's not quite true. I represented Mr. Cohen after he had signed the initial loan documents until the time — until past the time where he had actually settled with Mr. Boesky on April 8 of 1988.

Q With regard to your dealings with the Boesky group, the period of time that you represented him you say after he had signed this, would you give us an approximate time?

A It was —

Q With regard to what you have been asked on direct it starts as of at least July 30 of 1987.

A It was prior to that. I began representing Mr. Cohen I think in about February of '87.

Q Prior — from February through July through December of 1987 what were your dealings with the Boesky group, cordial?

MR. DANIEL: Objection. Relevance, beyond the scope.

THE COURT: It is beyond the scope of direct. Objection sustained.

MR. RECCHUITI:

Q With regard to the closing that took place do you recall any of the documents?

A That were executed at closing?

Q Yes.

A Yes, I do recall the documents.

Q Do you recall in fact that you never signed as a witness on any of them?

A I don't recall that for a fact. I think I did not. I would have to look at the documents. I may have. I don't remember. I don't think I did though. It is a long time ago and there were a lot of documents.

THE COURT: I think we can agree on that if this is important.

MR. RECCHUITI: I think it is important.

With regard to Government Exhibit 89(a) may I approach the witness, Your Honor.

BY MR. RECCHUITI:

Q The government introduced — excuse me, I'll give you a chance to read that.

A (Witness reading) Yes.

Q There is an insertion in that document, is there not?

A Yes, there is.

MR. DANIEL: Your Honor, again I'm going to object. It's beyond the scope.

THE COURT: Sustained.

MR. RECCHUITI: There was discussion about the settlement of April 8, Your Honor.

THE COURT: Well, your last question was whether he had witnessed any documents and then you showed him this.

BY MR. RECCHUITI:

Q Well, did you review that document at the closing?

A I was one of two attorneys representing Mr. Cohen at closing. There was a senior partner from my firm, John Samel was there, but I do remember reviewing this document, yes.

THE COURT: You reviewed this document.

BY MR. RECCHUITI:

Q And do you know the addition that looks like it was written in there, who did that?

MR. DANIEL: Objection again, Your Honor, beyond the scope. The only direct testimony — testimony on direct regarding the bond assignment form is another document. This is not within the scope of direct.

THE COURT: Well, I agree it isn't, but I will allow the answer if Mr. Leiderman knows. Do you know who put that in there, Mr. Leiderman?

THE WITNESS: I don't remember.

MR. RECCHUITI: I just wanted to know. Thank you. No further questions from me.

THE COURT: Any questions?

MR. HEIDECKER: A few questions.

CROSS EXAMINATION

BY MR. HEIDECKER:

Q Mr. Leiderman, at the time of this meeting on March 17, 1988 Mr. Daddona met with you accompanied by his — with his attorney Charles Hair, did he not?

A I don't remember honestly. I mean it was so inconsequential a meeting to me that I really didn't —

Q And just so we're clear, the inference that you make in this memo that you put in your file was your inference, am I correct?

A Absolutely.

Q It wasn't "Jack" Daddona's, was it?

A Absolutely not.

Q And correct me if I'm wrong, but the inference that you draw is not that the bonds are invalid, correct?

A Correct.

Q Daddona never said the bonds were invalid?

A Absolutely.

Q Daddona never said the bonds were legitimately obtained?

A Absolutely.

Q Now I note in your memo that you mention only the performance bond. Not the bonds, but the performance bond.

A That's correct.

Q The performance bond protects the owner, does it not?

A Protected Sidney Cohen, the owner, bond representative.

Q It protected Sidney Cohen, the owner, who you represented. The performance bond had nothing to do with subcontractors?

A Absolutely not.

Q And Daddona and you talked nothing at all about labor and materials bonds?

A This is correct.

Q Okay, now it's the performance bond that Daddona indicated that Sid should not file a claim against. That caused you

to infer there might be something wrong with the bond because Daddona said, hey, Sid shouldn't file a claim against it?

A Exactly.

Q Did you come to learn later why Sid shouldn't file a claim against that bond?

MR. DANIEL: Objection.

THE COURT: Overruled.

A Yes, I did.

BY MR. HEIDECKER:

Q Why shouldn't Sid file a claim against it? What was the import of that inference that Daddona left you with?

A Months afterwards and after the closing on April 8, 1988 and after the issuance of the bonds —

THE COURT: Would you summarize the reasons and then if you have to make any explanation, you can.

What was the question again? Why was it —

BY MR. HEIDECKER:

Q Yes, why was the inference that Daddona left you with, why were you incorrect in assuming from that inference that there was something the matter with the bonds when he said, hey, Cohen shouldn't make a claim against these bonds?

A The reason that Mr. Daddona said that or the fact I was not aware of which was that —

MR. DANIEL: Objection, Your Honor, he is about to speculate as to —

THE COURT: You can't speculate why Mr. Daddona said it. The question is did you learn something later —

THE WITNESS: Yes.

THE COURT: — that indicated the inference was wrong?

THE WITNESS: Yes, the fact that Mr. Cohen was also an indemnitor on the bond and that if he filed a claim against that bond effectively he would end up having to pay the claim to himself. It was meaningless as to Sid.

BY MR. HEIDECKER:

Q So if Sid Cohen files a claim against the bond, he is claiming against himself?

A That's correct.

Q And did that justify then the inference that you drew from Daddona, did that clear it up for you?

A Yes, it did.

Q Okay, was there any other mention of an inference concerning validity or legitimacy of these bonds other than that Sid shouldn't file a claim?

A Absolutely not.

Q Okay, and would you agree with me, sir, that Daddona was accurate, that if Sid filed a claim it would be basically meaningless?

A Correct.

Q You, as an attorney, know that Sid would be suing himself?

A This was a fact that I was unaware of at that time.

Q You were unaware of that fact?

A Yes.

Q You came to learn about that fact later?

A Subsequent to this April 8 settlement, yes.

Q Forget innuendo, it would be stupid for Sid to move against those bonds, wouldn't it?

A Foolish.

Q Foolish, thank you.

Now the settlement that you attended with Mr. Boesky you attended on behalf of Sidney Cohen, correct?

A Correct.

Q Sidney Cohen was to be paid $216,000?

A Correct.

Q Sidney Cohen walked out of that settlement with a check of about $106,000?

A That is correct.

Q Taken from Sidney Cohen was about $110,000 to theoretically have been paid to various subcontractors according to Mr. Boesky?

MR. DANIEL: Objection as to scope.

THE COURT: I don't want to have to require Mr. Leiderman to come back, so I will allow it.

THE WITNESS: Thank you, Your Honor.

MR. HEIDECKER: I will be brief, Judge.

BY MR. HEIDECKER:

Q Taken from Cohen out of his end of the settlement, he's promised $216,000 and he walks out with $106,000, am I correct, in round numbers?

A That's correct.

Q Taken from him was about $110,000, Mr. Leiderman?

A Yes.

MR. DANIEL: Objection to the characterization taken from him.

MR. HEIDECKER: I agree that's unfair.

THE COURT: Let's avoid characterizations.

BY MR. HEIDECKER:

Q Withheld from his check was about $110,000?

A That's correct.

Q And that was withheld for the purpose at least to your knowledge to pay various subcontractors?

A Yes, it was withheld by Mr. Boesky's organization on the premise that they could take that money and directly pay subcontractors that were owed money on the Green Hill Project with that money.

Q To your knowledge were any of those subcontractors paid?

A Absolutely not.

Q Indeed, was Mr. Cohen actually sued by one of those subcontractors who Boesky withheld the money to pay?

A Yes, they were. To my knowledge I have no knowledge of any of the subcontractors being paid.

Q And that other than that meeting you had where Daddona talks only about the performance bond and only about Sid not being smart to go against the performance bond, was there anything else that Daddona ever did with respect to you that indicated the bonds were less than 100 percent valid or legitimate?

A Nothing.

MR. HEIDECKER: Thank you. No further questions.

REDIRECT EXAMINATION

BY MR. DANIEL:

Q Mr. Leiderman, I think you testified on cross that none of the subs were paid at that settlement?

A No, I didn't. I testified that I had no personal knowledge of the subs being paid in full.

Q You were at the settlement, right?

A Yes.

Q You looked over the settlement sheet?

A Uh-huh.

Q Did you go over the entries regarding the payments to the other third parties?

A Yes, I did.

Q Did you see the checks made out to —

A I saw checks, my —

Q Let me finish the question, sir.

A Please, I'm sorry, I know I do that.

Q Did you see the checks made out to White-Westinghouse in the amount of $25,185?

A Yes. I am also aware that White-Westinghouse sued Mr. Cohen.

Q Please, Mr. Cohen, [sic] I am just asking you a simple question. I would like a simple yes or no.

A I imagine I saw that check, yes.

Q Did you see the check made out to Krehling Industries for $1,616?

A I am sure I did.

Q Did you see the check made out to Galatin Industries for $9,160?

A I imagine I did.

Q Did you see the check made out to Whitco Carpet and Tile for $2,955?

A I imagine I did, yes.

Q And those were obligations of Mr. Cohen, isn't that correct?

A They were allegedly obligations of Mr. Cohen. He had no opportunity to contest them at the time. And, if I may, —

Q Sir, —

THE COURT: Please don't.

A Go ahead, I'm sorry.

BY MR. DANIEL:

Q You said on cross that you later found out that your inferences were wrong because you learned that Mr. Cohen had signed an indemnity agreement on that bond?

A Yes, sir, I did.

Q Well, isn't it true that you knew that Mr. Cohen had signed that indemnity agreement back in July of 1987 prior to the time you received the bonds?

A No, it is not true at all. I did not participate in the negotiation of the bonds with Mr. Culnen. I had no idea other than the fact that the bonds were issued. I just served to convey the bonds over to him.

Q Well, even if you didn't know that, sir, what import would that have anyway when you wrote that the bonds were not obtained legitimately? In other words, irrespective of the fact that Mr. Cohen may have signed an indemnity agreement, that would only concern his ability to actually obtain eventual financial recovery, correct?

A You're going to have to allow me to answer more than just the word correct because that would not be responsive to the question.

Q Why don't you answer yes or no and then you can explain.

A Certainly Mr. Cohen could not claim on those bonds, yes.

Q Thank you. Now let me ask you —

MR. RECCHUITI: Your Honor, may he be allowed to explain his answer at this point because it appears he is being cross examined?

THE COURT: It does appear that way. I'm going to let Mr. Daniel go ahead with his next question at this point. I'm sure Mr. Leiderman will come back to that if an explanation is required. Go ahead.

BY MR. DANIEL:

Q So the indemnity agreements have no bearing, have no import on whether or not the bonds were obtained legitimately as they are wrote, isn't that correct?

MR. HEIDECKER: Objection.

THE COURT: I think that's an argument, Mr. Daniel. I really do.

BY MR. DANIEL:

Q All right, Mr. Daddona, —

THE COURT: Mr. Leiderman.

BY MR. DANIEL:

Q — or, excuse me, Mr. Leiderman, —

A Please.

Q — you said on cross that you really thought that this conversation was inconsequential and really didn't amount to anything?

A Yes, sir.

Q Well, if it was so inconsequential, sir, why did you type a memo for the file?

MR. RECCHUITI: Your Honor, objection.

THE COURT: Objection sustained. I think this has been covered.

MR. DANIEL: May I have a moment, Your Honor?

THE COURT: Sure.

BY MR. DANIEL:

Q Mr. Leiderman, you were asked on cross about how long you represented Mr. Cohen. Do you still represent him today?

A No, sir, I do not.

Q What about Mr. Daddona?

A Yes, I represent Mr. Daddona.

Q Are you his lawyer?

A Yes, I am, sir.

MR. DANIEL: No other questions.

THE COURT: Okay.

MR. HEIDECKER: I have a few questions very briefly.

RECROSS EXAMINATION

BY MR. HEIDECKER:

Q The words obtained legitimately, were those Daddona's words to you?

A They were my words.

Q Those weren't spoken words, those were inferences because Daddona said Sid shouldn't claim against the bonds, correct?

A Exactly.

Q Which later proved to be incorrect on your part, correct?

A Correct.

Q After you found out about the indemnity agreement, correct?

A Correct.

Q Was there also at that same meeting on March [date omitted] sorry, a week later on the 24th, direction given to Mr. Daddona to file a claim in the amount of $227,000 against Green Hill and against Summit?

A I don't remember that.

MR. HEIDECKER: Thank you.

THE COURT: Thank you, Mr. Leiderman. You are excused, sir.

MR. DANIEL: The government calls Les Stewart.

LESLIE DAVID STEWART, called as a witness, being duly sworn, testified as follows:

THE CLERK: For the record please state your full name.

THE WITNESS: My name is Leslie David Stewart, S-t-e-w-a-r-t.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. DANIEL:

Q Mr. Stewart, where do you live?

A I live at R.D. 3, York, Pennsylvania.

Q What do you do for a living, sir?

A I am a — I have a construction company.

Q What's the name of it?

A York Excavating Company, Incorporated.

Q How long have you had that company?

A Approximately eight years right now.

Q What kind of work do you do?

A Commercial excavating and paving.

Q Did you have that company in 1987?

A Yes, I did.

Q In 1986 and 1988?

A Yes, I did.

Q How big a company is it, how many employees at that time, ballpark?

A Ballpark 35 to 40.

Q Sir, I want to direct your attention to the summer of 1986. Did you have occasion to become involved in any work on the Green Hill Project?

A Yes, I believe late '86.

Q What did you do, sir?

A We had the contract to do the site work, sewer work, water, utility work and paving.

Q Who was your contract with?

A If memory serves me, I believe it was Green Hill Associates I believe.

Q And what kind of work was that, you said site work?

A Getting the area, you know, getting the area prepared to accept buildings.

Q Leveling the ground?

A Yes.

Q How long had you worked on that project?

A Approximately six, seven months.

Q And did there come a time where you left the project?

A Yes.

Q Why?

A Lack of payment, confusion on grades, no proper response.

Q Who was supervising your work on the project?

A I think Susquehanna Construction was supposed to be supervising it.

Q Okay, do you know the company Eastern Consolidated Utilities?

A Yes, I'm familiar with them.

Q Were they on the job site in 1986?

A Not that I know of, no.

Q At the time you left how much money were you owed?

A At the time I left, at that time?

Q Yeah.

A I really don't remember.

Q Can you give us an idea? Was it something more than a thousand dollars?

A Yes.

MR. RECCHUITI: Objection.

THE COURT: We'll allow the witness to state the approximation if he wishes to.

BY MR. DANIEL:

Q Could you approximate, sir?

A On the first time that I left?

Q Yes, the first time you were there.

A No.

Q Who owed you the money?

A Green Hill Associates I presume.

Q And who was Green Hill Associates?

A To the best of my knowledge it was Sid Cohen.

Q Sir, did there come a time where you were recruited to come back to the job site?

A Yes, there did.

Q When was that?

A I think it was in the fall, late summer, early fall of 1987.

Q And who recruited you to come back to the job site?

A Sid Cohen.

Q And what did he say to you to induce you to come back to the job site?

MR. RECCHUITI: Objection. Is this leading, Your Honor?

BY MR. DANIEL:

Q What did he say to you, sir? I will rephrase the question, Your Honor.

A He wanted me to come back and finish the job.

Q Did you have any concerns about doing that?

A Quite a bit.

Q What were your concerns?

A That I wouldn't get paid.

Q Did you ask him for anything?

A Yes, I asked him for proof of payment, in other words, it was indicated that the job was protected, that the job was bonded.

Q Who told you that?

A Mr. Cohen.

Q And did you ask him for anything?

A Yes.

Q What did you ask him for?

MR. RECCHUITI: Your Honor, leading. Leading.

THE COURT: Not really, go ahead.

A I asked him for proof of — that the job was protected, that the job was bonded.

BY MR. DANIEL:

Q And did he send you anything?

A Yes, he did.

Q What did he send you?

A He sent me a copy of a Wausau bond.

Q How did he send it to you and when did he send it to you?

A How he sent it to me, I received it by mail and when, I do not remember. It was shortly after I requested it.

Q I show you what's marked as Government's No. 48. Is that what he sent you in the mail, sir?

A Yes, it is.

Q Purports to be copies of a $3 million Wausau bond on the Green Hill Project, isn't that correct?

A That's correct.

Q Sir, there are some initials that appear underneath the grand jury exhibit sticker. Whose initials are those?

A Those are mine.

Q And the date below the initials, what's the date?

A 8-30-1988.

Q Did you put those initials and date on there?

A I believe I did.

Q And can you — do you recall why and when you did that?

A Probably because I was requested to and apparently it was 8-30-88.

Q Is that when you turned it over to the government, that copy of that bond?

MR. RECCHUITI: Your Honor, that's objected to.

THE COURT: Objection sustained.

BY MR. DANIEL:

Q Sir, after you received this copy of the Wausau bond from Mr. Cohen did you enter into any contract?

A Yes, we did.

Q With whom?

A Eastern Consolidated.

Q And what was that contract for?

A To basically get into interior roadways, streets, I don't —

MR. HEIDECKER: Objection, Your Honor. This is irrelevant. It deals with the first bond, a different job altogether.

MR. DANIEL: Not so, Your Honor.

THE COURT: I thought we were talking about the No. 48, which is the $3 million bond.

MR. HEIDECKER: Talking about the contract with ECU.

THE COURT: I'm going to overrule the objection.

BY MR. DANIEL:

Q You said something about interior roadways. What do you mean by that, what are interior roadways?

A Well, there was some township street work to go on around the project. I think there was some street improvements on a — there was a new township street to put in. There were some street improvements to go on another and then it was an apartment complex. They had to have roadways to get, you know, from one to another is what I refer to as interior roadways.

Q And what was the approximate dollar value of that contract, sir, do you recall?

A I don't really recall. I think about $180,000 or something like that.

Q Is that the only contract you entered into at that time?

A I think we entered into a couple different contracts for a couple different phases.

Q Were they all with Eastern?

A Yes, I believe they were.

Q What is Tudor Development Group?

A I don't know.

Q Did you enter into any contracts with them?

A I believe we did.

Q And what — would that have anything to do with the Green Hill Project?

A Yes.

Q I'll show you Government's No. 49. Is that a copy of a contract that you executed for the Green Hill Project after you were provided with copies of the Wausau bond?

MR. RECCHUITI: Objection. Your Honor, that is leading.

THE COURT: Objection sustained. Why don't you ask the witness what it is, Mr. Daniel, without telling him what it is.

BY MR. DANIEL:

Q Mr. Stewart, can you identify that please.

A Yes, that's a formal contract that was entered into.

Q What's the date on that contract, sir?

A 15th of October of 1987.

Q Okay, who are the parties to that contract, sir?

A Green Hill Associates, Tudor Development Group, Incorporated and York Excavating Company, Incorporated.

Q And what type of work was called for under this contract?

A This is paving work for the interior roadways.

Q Okay, would that be like putting macadam down on the road?

A Stone base, macadam, yes, sir.

Q Were there other contracts besides that contract?

A Yes, I believe there was.

Q Now, sir, who supervised your work on the project this time during the second time you were on the job site in '87?

A At that time around Eastern Consolidated had a man on board by the name of — I think his name was Tony Daddona.

Q And who paid you?

A Eastern Consolidated.

Q And how long were you on the job site?

A Probably maybe four months.

Q And then what happened?

A Well, we again we vacated the job through lack of payment.

Q And when would that have been, sir, approximately when you left the job site?

A Probably the end of '87, beginning of '88.

Q Who is Daniel Culnen?

A Who is Daniel Culnen?

Q Yes.

A He's a bonding agent.

Q Let me ask you this before we talk about him, at the time you left the job site, sir, how much money was owed to you?

A I think it was approximately a hundred and — somewhere between 120 and 150 thousand.

Q And Daniel Culnen, did you ever have any meetings with him?

A Yes, I did.

Q Where and when?

A It was in early or I'd say spring of — right around Eastertime, that I do remember. I don't remember the dates but it was in the spring of '88.

Q Was there more than one meeting?

A Yes, there was.

Q Where did this take place?

A They took place at the Sheraton Inn West in Harrisburg.

Q Okay, that's across the river on the West Shore?

A That's correct.

Q And who was at the first meeting?

A It was Dan Culnen, "Jack" Daddona, "Jack" Meyers and myself.

Q And who called for the meeting?

A I don't really remember.

Q And what happened at the meeting?

A Nothing.

Q When you say nothing —

A Well, —

MR. RECCHUITI: Objection, Your Honor. The question was asked and answered.

THE COURT: Well, we have had testimony about that before. We don't need to go into it again.

BY MR. DANIEL:

Q How long did the meeting last?

A Long enough to do nothing, about 30 seconds.

Q And was there a second meeting?

A Yes, there was.

Q When was the second meeting?

A I think it was one week afterwards.

Q The same location?

A Yes, the same location.

Q And who was at that meeting?

A Dan Culnen; I think Sid Cohen; I think maybe "Jack" Daddona; maybe Tony Daddona, I'm not sure; I, myself.

Q What about Mr. Meyers?

A Mr. Meyers.

Q And how long did this meeting last?

A A minute or two.

Q Who called this meeting, do you recall?

A No, I do not.

Q What happened in this meeting?

A A shouting match ensued and — between Mr. Cohen and myself I believe and the meeting was broken up.

Q What were you shouting about?

A I really don't remember.

Q Sir, did there come a time where you filed a claim on the $3 million Wausau bonds?

A Yes, there was.

Q When was that, sir?

A Probably shortly after that meeting, probably April or May.

Q I show you Government's Exhibit No. 91. Is that the claim letter you sent to Wausau?

A Yes, it is.

Q And the date of it is what, sir?

A April 14, 1988.

Q Did you ever get a response back from Wausau?

A Yes, I did.

Q I show you Government's No. 102. Is that the response?

A Yes, it is.

Q And the date on it?

A April 26, 1988.

Q And who is the letter from, sir?

A The letter is from Steven D. Robinson, bond claim attorney.

Q Okay, and, sir, would you — directing your attention to — let me ask you this, do you recall — well, let me — strike that. The letter, it's addressed to a post office box?

A Yes.

Q At your address, correct?

A Yes, that's correct.

Q Is that how you received it, —

A Yes.

Q — in the mail?

A Yes.

Q In York, Pennsylvania?

A Yes.

Q And directing your attention, sir, to the last sentence that's highlighted in the first paragraph, would you read that.

A We have ascertained that no valid or authorized bond exists for that project. Given no bond exists, Employers Insurance of Wausau a mutual company denies any obligation to you.

Q Would you continue in reading the next sentence please.

A Please inform us how you obtained a copy of this unauthorized and invalid bond. We request this information only for the purpose of continuing our investigation into this matter.

Q Now after you received this response from Wausau in which they told you that —

THE COURT: Well, after you received the response.

MR. DANIEL: Yes, sir.

BY MR. DANIEL:

Q Did you contact anybody?

A Yes, I tried to contact people at Wausau to find out what was going on.

Q Did you respond to Mr. Robinson?

A I don't remember.

Q I show you Government's No. 109. Can you identify this for me, sir?

A Yes. Yes.

Q What is it, sir?

A It is a response letter to Mr. Robinson.

Q The date of the letter?

A The letter was dated May 9, 1988.

Q And what did you tell Mr. Robinson in this letter.

A That, you know, that I am writing in response to your letter dated April 26, 1988. A copy of the bond No. 13 was mailed to me upon request by Mr. Sid Cohen, 8206 New Second Street, Elkins Park, Pennsylvania 19117.

Q After Wausau told you that no valid bond existed or authorized bond existed, did you file any lawsuits against Wausau?

A I have recently, yes.

Q When was that, sir?

A I believe last year sometime, I'm not sure.

Q Did you file any lawsuits in the remainder of 1988 or 1989?

A Against Wausau, no, I don't believe I did.

Q Sir, have you lost any money or are you owed any money for your work on the project in 1987?

MR. HEIDECKER: Objection.

THE COURT: Sustained.

Anything further?

BY MR. DANIEL:

Q Just one final question, Mr. Stewart. After Wausau told you that no valid bond existed did you speak with Mr. Cohen about the bond?

A I don't remember.

Q What about Mr. John "Jack" Daddona, did you speak to him about the bond or communicate with him?

A No, I don't think I did.

MR. DANIEL: No other questions.

THE COURT: Any questions?

MR. RECCHUITI: Yes, sir.

CROSS EXAMINATION

BY MR. RECCHUITI:

Q Mr. Stewart, you've identified Government's Exhibit 49 as a true and correct copy of a contract that you entered into with Green Hill, Tudor Associates Development Group as of the 15th of October of 1987, is that correct?

A That's correct.

Q Take a good look at it. Are you sure that that's the copy of the exact contract?

A No.

Q You're not sure. Who supplied that to the government?

A I did.

Q When did you supply it to them?

A I don't remember.

Q Now you were asked whether or not you started a lawsuit, is that correct?

A I'm sorry?

Q You were asked whether or not you started a lawsuit, is that correct?

A That's correct.

Q And your response was that you had, is that correct?

A Yes, that's correct.

Q And to that lawsuit you attached a copy of a contract, isn't that correct?

A I presume so.

Q Would your recollection be that a copy of the same contract that you have before you identified as Government's Exhibit No. 49?

A I don't understand the question.

Q Would you say that the copy of the contract which you attached in that lawsuit is the same as that copy which is before you and marked as Government's Exhibit No. 49?

A I'm not sure. My attorneys handle that.

Q Did your attorneys handle the preparation of the contracts?

A No.

Q Who handled the preparation of the contracts?

A This contract?

Q Yes.

A I do not know.

Q Well, who signed it on behalf of York Excavating Co., Inc.?

A I did.

Q Leslie D. Stewart, is it?

A That's correct.

Q And your testimony is that you don't know if the copy of the contract which is before us is the same as the copy of the contract which is attached to the lawsuit, is that correct?

A That's correct.

Q So is it your testimony that the copy — excuse me, Your Honor, may I approach the witness for just a minute. It's a photocopy, is that correct, sir?

A I don't know.

Q Mr. Stewart, you — Mr. Stewart you testified, did you not, about the contract, about why you went on the job and why you left, is that correct?

A That's correct.

Q And did you give the jury a full and accurate picture of what happened when you just testified?

A I have no idea.

Q I'm going to show you a document that's been identified for purposes here as Defendant's Exhibit C 6 and ask whether or not that is in fact an amended complaint and a copy of the lawsuit that you filed that was supplied as an exhibit to a deposition that you took several weeks ago?

A I don't know. It's a copy of a deposition. I don't know what an amended complaint is.

Q Well, we'll just go through this here and is that a copy of your attorney's signature?

A That is my attorney's name. I assume that's a copy of the signature.

Q And it indicates that there is a lawsuit here in the Middle District of Pennsylvania, is that correct?

A Yes, that's correct.

Q It says amended complaint, is that correct?

A That's correct.

Q And I'm going to show you that which is attached as a contract as Exhibit B.

A Yes.

Q Now I want you to take that contract over there, that copy there, and I want you to put it beside this contract and I want you to tell me if they are the same.

A No.

Q They are different?

A Yeah.

Q You mean the government's exhibit is incomplete?

MR. DANIEL: Objection.

THE COURT: Sustained.

BY MR. RECCHUITI:

Q Does the Government Exhibit No. 49 have as much writing on it as that which was attached to the complaint, the contract?

A No.

Q Would you read what is also on the contract which you attached or your attorney attached to the lawsuit that you brought.

MR. DANIEL: Objection to relevance, Your Honor.

THE COURT: Objection sustained. We're getting off of the track here. I mean I don't want to get into Mr. Stewart's civil lawsuit.

MR. RECCHUITI: No, Your Honor, but we are going to have to get into the reason that he said that he left and the reason with regard to his motive and credibility.

THE COURT: Well, that's not one of the issues in this criminal case.

MR. RECCHUITI: May I just lead one more question.

BY MR. RECCHUITI:

Q Isn't it a fact that there is an issue regarding — it says added to the contract here it is agreed and understood that

York Excavating, Inc. has deposited $60,000 cash with the owner in lieu of a $180,000 performance bond?

A That's correct, that's what it says.

Q And the owner being —

A I don't know. It is stated as Green Hill Associates. Who the owner is, I don't know.

Q Now you told this court and you'd have the Court believe —

MR. DANIEL: Objection, Your Honor.

THE COURT: Sustained.

MR. RECCHUITI: I'm sorry.

THE COURT: That's an improper preface.

BY MR. RECCHUITI:

Q You indicated, did you not, that what were the reasons that you left the job the first time?

A I'm sorry?

Q What was the reason that you left the job the first time?

A Lack of grades, absolute confusion and lack of payment.

Q In fact you were in default the first time, weren't you, Mr. Stewart?

A No.

Q What happened to the $60,000?

A Mr. Cohen took it.

Q Do you understand what the term defaulted means?

A Yes.

Q Who has the $60,000?

A I have no idea.

Q You didn't get it back, did you?

A No, I didn't.

Q You never sued to get that $60,000 back, did you?

A Yes, I did.

Q Where?

A I don't remember. My attorney handled that.

Q With regard to Government's Exhibit 109 — approach the witness again — did you type that letter?

A I'm sorry?

Q Did you type that letter?

A I didn't, no, I doubt it.

Q Did you sign it?

A Yes.

Q Did you review it before it went out?

A Yes.

Q When was it —

A I don't remember. When was it sent?

Q I didn't finish the question. When was it that you received a copy of this bond?

A I don't remember.

Q You have no recollection at all, is that correct?

A That's correct.

Q You don't recall whether it was before or after you started the job, isn't that correct?

A It would have been — it would have been pretty close to whenever I started the job.

Q Didn't you previously testify while under oath that you don't recall when it was?

A That's correct, I do not recall when it was.

Q Now you indicated that it was sent to you by the mail?

A That's correct.

Q And you don't remember when you received it?

A That's correct.

Q And did it come in an envelope?

A I don't know.

Q Did it come in a box?

A I don't know. My mail is opened for me.

Q Did it come with an accompanying letter?

A I don't remember.

Q Do you maintain any office files anywhere?

A Yes.

Q Now just exactly where was it sent, sir?

A It was sent to my office. It would have been sent to my office, that's how I received it.

Q Did you ever receive any mail from Mr. Cohen ever in your whole relationship with him from him at your office?

A Yes.

Q And what was the return address that was on any of his mail?

A I don't remember. I don't know.

Q Where did you get the return address that's indicated in this letter that was sent to Steven Robinson?

A That would have been Sid Cohen's address as best I knew it.

Q When you communicated with Sid Cohen did you ever communicate with him by mail?

A I don't remember.

Q Did you ever send him a letter?

A I don't remember.

Q Who supplied you Sid Cohen's address?

A I do not remember that. It's probably in the phone book.

Q Would you tell us which phone book?

A I said it's probably in a phone book.

Q It is a fact with regard to the losses that you claim that you have sustained, Mr. Stewart, that includes the work from the first job, doesn't it?

A I'm sorry?

Q The losses that you say that you sustained, that includes all of your losses on this job including the first part, doesn't it?

A I'm sure it probably does.

Q Now you indicate that you received this sometime and you say that you had this bond somewhere. When did you stop getting paid?

A I don't remember.

Q And you have accurately—you have accurately told us about the two meetings at the Sheraton in which before there was any discussions basically there was a fight or an argument, is that correct?

A Rephrase that please.

THE COURT: Have you accurately reported what occurred at the two meetings?

THE WITNESS: To the best of my memory, yes, sir.

THE COURT: All right, is that all?

MR. RECCHUITI: That's it, Your Honor.

THE COURT: Any questions?

MR. HEIDECKER: Very brief, Judge, very brief.

CROSS EXAMINATION

BY MR. HEIDECKER:

Q The site work, Mr. Stewart, wasn't it your understanding that that site work was the subject of a different bond, the $790,000 bond issued by Wausau?

A I was not aware of that.

Q You weren't aware of that. Now these meetings, I'm going to ask you one question with respect to them. Isn't it true that "Jack" Daddona never mentioned anything about any bonds at any of these two meetings that you went to in March and April of '88?

A I — I doubt that he did.

Q You doubt that he did, right. As a matter of fact, "Jack" Daddona never talked to you about a bond at all, did he, at any time?

A No.

Q Never showed you a bond, never discussed a bond, never had a written correspondence about bonds with Daddona ever, correct?

A That's correct.

MR. HEIDECKER: No further questions.

THE COURT: Okay, that's all. Thank you, Mr. Stewart.

MR. DANIEL: The government calls Thomas Strawbridge.

THOMAS LOUIS STRAWBRIDGE, called as a witness, being duly sworn, testified as follows:

THE CLERK: For the record please state your full name.

THE WITNESS: Thomas Louis Strawbridge.

DIRECT EXAMINATION

BY MR. DANIEL:

Q Good morning, sir. Tell us what do you do for a living, Mr. Strawbridge?

A I'm a drywall contractor.

Q How long have you been a drywall contractor?

A For seven years.

Q What's the name of your company?

A Strawbridge Drywall, Inc.

Q Where is it located?

A At 2043 Green Street, Harrisburg.

Q What kind of drywall work do you do, residential or commercial or both?

A Residential and commercial.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

YORK EXCAVATING COMPANY, INC., Plaintiff	:	
v.	:	
EMPLOYERS INSURANCE OF WAUSAU, Defendant	:	NO. CV-91-1037 (McClure)
v.	:	
EASTERN CONSOLIDATED UTILITIES, INC., et al., Defendants	:	

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

YORK EXCAVATING COMPANY, INC., Plaintiff	:	
v.	:	
EMPLOYERS INSURANCE OF WAUSAU, Defendant	:	NO. CV-91-1037 (McClure)
v.	:	
EASTERN CONSOLIDATED UTILITIES, INC., et al., Defendants	:	

MEMORANDUM

October 21, 1993

BACKGROUND

Plaintiff York Excavating Company, Inc. (York) filed this action to recover on a labor and material payment bond purportedly issued by Employers Insurance of Wausau (Wausau) in connection with an apartment complex construction project known as the Green Hill Project and located in Susquehanna Township, Dauphin County, Pennsylvania.[1] Green Hill Associates (GHA) was the project developer and the original owner.

When problems arose on the Green Hill Project between the developer and the general contractor, Susquehanna Construction Company (Susquehanna), Susquehanna defaulted on

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1. Disputes arising out of the Green Hill Project were the subject of another action filed before this court, *Tudor Development Group, Inc. vs. United States Fidelity & Guaranty Company*, Civil No. 88-0758 (M.D.Pa.). See 968 F.2d 357 (3d Cir. 1992). That case is now concluded.

its contract with the developer prior to completion of the project. Eastern Consolidated Utilities (Eastern) was then hired to replace Susquehanna and complete the project. Pursuant to a contract with GHA signed July 20, 1987, Eastern agreed to complete the site work (the installation of interior road ways, parking areas and driveways, among other things) and agreed to perform all of the work and furnish all materials, labor, and equipment necessary to complete such work.

To secure payment of its subcontractors, Eastern obtained a labor and material payment bond (Bond #1150-13-052625) in the amount of $3 million from Wausau as surety naming GHA as owner.[2] The bond was signed and purportedly issued under the authority of Wausau's agent, Daniel Culnen as attorney-in-fact. It bore the co-signature of "Adams". Subsequent events revealed that Culnen had issued the bond without authority. Although he was an agent of Wausau, he had no authority to issue the bond shown to York.

York entered into two written contracts with GHA/Tudor Development Corporation on October 15, 1987 to perform site work at the project. It is suing to recover in this action for work performed under the two written contracts with GHA and under the terms of an alleged oral agreement with GHA and Eastern entered into in August, 1987 to perform repair work and general contractor work on the project on a time and material basis. (Plaintiff's amended complaint, paras. 13-16) (See also: Record document no. 39, exhibit "F", Wausau's Statement of Undisputed Facts, paras. 5-10, and Record document no. 44.)

York alleges that it is owed $8,480.70 for work performed on the interior road ways of the project (under the first written agreement with GHA); $1,980.00 for work performed on the interior parking area (under the second written agreement with GHA); and $131,424.50 for repair work and general contractor work performed under the alleged oral contracts with Eastern and GHA. (Plaintiff's amended complaint, paras. 18-21 and 26-28) It also seeks to recover lost profits and overhead

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2. A copy of the bond is attached to plaintiff's amended complaint as Exhibit "A".

expenses incurred under the two written agreements with GHA in the amount of $76,440.00.

York bases its claim that an oral agreement existed on the following. Eastern actively participated in negotiations with GHA and approved York as a subcontractor for the project. It also supervised York's work on the project, both directly through its employees and indirectly through the management company, Construction Management Corporation (CMC), which it retained, to serve as construction manager until Eastern was in a position to manage the project itself, and issued work orders and change orders directed to York. York also cites the method of payment as proof that a contractual relationship existed between it and Eastern. On one occasion, a check drawn on GHA's accounts made payable to Eastern was endorsed in blank by Eastern and turned over to York as payment for its work on the project. Finally, when York requested proof that it would be paid for the work performed, it was shown the payment bond purportedly issued by Wausau under which it now sues.

On April 14, 1988, York submitted a claim to Wausau under the labor and material payment bond issued for the project. Wausau refused payment on the ground that no valid or authorized bond existed for the Green Hill project.[3] In a letter dated April 26, 1988, Wausau denied York's claim under the bond on the ground that no valid or authorized bond existed for the Green Hill project. Based on that denial, York made no further effort to recover against Wausau until approximately June, 1991, when it learned that a bond for the project had, in fact, been issued over Culnen's signature.

York was not paid for all work performed on the project. This action is one of several filed by York to recover for all work performed on the Green Hill Project. York filed this action against Wausau on August 12, 1991 seeking to recover sums allegedly still owed by Eastern for work performed on the project — totalling $141,887.20, as well as $76,440.00 for lost profits and overhead expenses, a total of $218,327.20.

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3. These allegations are set forth in plaintiff's amended complaint filed December 16, 1991 (Record Document No. 11).

York also seeks punitive damages from Wausau for its alleged gross negligence and willful misconduct in denying York's claim under the bond.

Wausau filed a third party complaint containing five counts on January 29, 1992.[4] Counts I and II allege claims for indemnification against a number of individuals and corporations whom Wausau alleges have a contractual and common law obligation to indemnify it for any loss or expense it incurs as a result of this action (Counts I and II). Counts III and IV allege claims of indemnification and fraud against Culnen and the firm of Culnen & Hamilton based on their alleged complicity in issuing an unauthorized bond in Wausau's name. Count V alleges an indemnification claim against Sidney Cohen, Dorothy Cohen, Marc Cohen, and Tudor and GHA on the basis of alleged fraudulent and/or negligent misrepresentations made in connection with issuance of the bond.

Named as third party defendants are: Eastern Consolidated Utilities, Inc. (Eastern); Mid-Atlantic Pipeline, Inc. (Mid-Atlantic); Eastern Excavating, Inc. (Eastern Excavating); John L. Daddona, Sr.; Judy A. Daddona; Eva Daddona; Daniel J. Culnen (Culnen); Culnen & Hamilton, Inc. (Culnen & Hamilton); Green Hill Associates (GHA); Tudor Development Group, Inc. (Tudor).

The case is before the court on motions for summary judgment filed by the defendant and all third-party defendants. The parties' motions were filed to: 1) Record Document No. 37, by Wausau; 2) Record Document No. 49, by Eastern and other third party defendants; and 3) Record Document No. 43, by third party defendants Culnen and Culnen & Hamilton, who join in Wausau's motion for summary judgment.

For the reasons discussed below, we will enter an order: 1) granting in part the motion for summary judgment filed by Wausau; and 2) denying as moot the motion for summary judgment filed by Eastern and other third party defendants. Summary judgment will be granted in favor of Wausau and against York on York's claim for sums allegedly owed for work

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4. Record document no. 15.

performed and expenses incurred under the two written agreements with GHA and under the alleged oral contract with Eastern and GHA. Defendants' motion is denied in all other respects. York's claim against Wausau for fraud and Wausau's indemnification claims against Culnen and Culnen & Hamilton remain.

DISCUSSION

Summary judgment standard

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)

> . . . [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex v. Catrett, 477 U.S. 317, 323-324 (1986).

The moving party bears the initial responsibility of stating the basis for its motions and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. He or she can discharge that burden by "showing . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex, supra*, 477 U.S. at 323 and 325.

Issues of fact are " 'genuine' only if a reasonable jury, considering the evidence presented, could find for the non-

moving party." *Childers v. Joseph*, 842 F.2d 689, 693-94 (3rd Cir. 1988), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Material facts are those which will affect the outcome of the trial under governing law. *Anderson, supra*, 477 U.S. at 248. In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party. *White v. Westinghouse Electric Company*, 862 F.2d 56, 59 (3rd Cir. 1988).

Statute of limitations

Wausau seeks summary judgment on York's claims for fraud and payment under the bond on the grounds that both are barred by the applicable state statute of limitations. Pennsylvania law clearly applies.

Choice-of-law decisions are governed by the choice-of-law rules of the forum state. *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). In this instance, Pennsylvania choice-of-law rules require application of Pennsylvania law. The Green Hill project is located in Dauphin County, Pennsylvania. All contractors and entities involved with the project are located here. No other state has significant, relevant ties to the matters giving rise to the cause of action. Although the payment bond was issued in New Jersey, all relevant events, e.g., the work performed, took place in Pennsylvania. No other state has any contact with the events giving rise to either this action or the state court action. *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964).

Under Pennsylvania law, the statue of limitations for claims based on a payment bond is one year and, for claims of fraud, two years. 42 Pa. Cons. Stat. Ann. § 5523(3) and 5524(7). The limitations period is calculated from the date the cause of action arose. 42 Pa. Cons. Stat. Ann. § 5502(a).

York's work at the site was concluded by November, 1987 at the latest. When payment was not forthcoming, York contacted Wausau in April, 1988 and demanded payment under the bond signed by Culnen. Wausau refused payment on the ground that the bond was issued improperly and was invalid.

This information was conveyed to York by Wausau in a letter dated April 26, 1988 from Steven D. Robinson, Esq., Bond Claim Attorney for Wausau. The letter, addressed to Leslie Stewart, President of York, stated:

> EMPLOYERS INSURANCE OF WAUSAU A Mutual Company has conducted an initial investigation into the existence of an EMPLOYERS INSURANCE OF WAUSAU A Mutual Company bond for the Greenhill [sic] Apartment project. We have ascertained that no valid or authorized bond exists for that project. Given no bond exists, EMPLOYERS INSURANCE OF WAUSAU A Mutual Company denies any obligation to you.
>
> Please inform us how you obtained a copy of this unauthorized and invalid bond. We request this information only for the purpose of continuing our investigation into this matter.

This action was not filed until August 12, 1991, well beyond both the one year and the two year statute of limitations. York does not dispute applicability of the statute of limitations, but argues that the statute was tolled by the fraudulent misrepresentations of Wausau's agent, Daniel J. Culnen.

Fraudulent misrepresentations by a defendant or its agent toll the statute of limitations if

> the defendant, through fraud or concealment, causes the plaintiff to relax his or her vigilance or to deviate from the right of inquiry . . . In general, this requires that a defendant has done something amounting to an affirmative inducement to plaintiff to delay bringing the action.

Gravinese v. Johns-Manville Corporation, 471 A.2d 1233, 1238 (Pa. Super. Ct. 1984).

In applying this doctrine, the Pennsylvania courts have not "required fraud 'in the strictest sense encompassing an intent to deceive, but rather fraud in the broadest sense which includes an unintentional deception.' " *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1985), quoting *Nesbitt v. Erie Coach Co.*, 204 A.2d 473, 476 (Pa. 1964). However, "[m]ere mistake, misunderstanding or lack of knowledge is

insufficient" and the "burden of proving such fraud or concealment, by evidence which is clear, precise and convincing, is upon the asserting party." *Molineux v. Reed*, 532 A.2d 792, 794 (Pa. 1987).

If " 'through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry,' the defendant is estopped from invoking the bar of the statute of limitations." *Id.* at 794, quoting *Schaffer v. Larzelere*, 189 A.2d 267, 269 (Pa. 1963).

Culnen held himself out as Wausau's agent with its knowledge and authorization. "A principal is liable for the acts of its agent committed in the scope of its employment even though the principal did not authorize the act." *Pennsylvania National Mutual Casualty Insurance Co. v. Insurance Commissioner*, 551 A.2d 368, 373 (Pa. Commw. Ct. 1988). Wausau is, therefore, liable for any misrepresentation made by Culnen with apparent authority as its agent.

York contends that it did not attempt to pursue a claim on the bond because, due to the misrepresentations of Culnen, it had believed that there was no valid labor and payment bond in existence to cover the claims of Eastern's subcontractors, and that it was not until June, 1991, that it learned otherwise, when information about Culnen's alleged involvement in fraudulent bond transactions came to light.

Under the circumstances, Wausau is estopped from asserting the statute of limitations as a statutory bar to York's claim. Based on Wausau's unqualified denial of the existence of a valid or authorized bond for the project, York made no further attempt to assert a claim against Wausau until it learned that a bond had in fact been issued over Culnen's signature. Cf. *Firestone & Parson, Inc. v. Union League of Philadelphia*, 672 F.Supp. 819, 822 (E.D.Pa.), *aff'd without opinion*, 833 F.2d 304 (3d Cir. 1987).

Wausau advised York in no uncertain terms that no valid bond existed and that it had no claim. Under the circumstances, York's decision not to file suit was entirely justifiable. Any other course of action would have been unreasonable. It would have been irresponsible to file suit on a bond which it had been

informed by the purported issuer did not exist and had never been issued. Moreover, when York learned, from sources other than Wausau, that a payment bond had, in fact, been issued to Eastern, it promptly filed an action asserting its right to payment for work done at the GHA project.

Fraud claims

The statute of limitations defense is the only ground asserted for grant of summary judgment on York's fraud claim against Eastern. Since we reject that defense, Eastern's motion for summary judgment on those claims will be denied. The motion of third party defendants Culnen and Culnen & Hamilton will, likewise be denied for the same reason. Counts III and IV of Wausau's third party complaint, therefore, remain in the case.

Proper claimant

Wausau asserts a second ground for grant of summary judgment on York's claim under the payment bond. It asserts that York is not a proper "claimant" as defined by the payment bond since it furnished labor and materials pursuant to contracts with GHA, not the bond principal, Eastern.

We reject York's argument that Wausau is estopped from raising the claimant argument because in the April, 1988 letter denying liability, Wausau did not raise this issue. Failure to assert all potential defenses at that time does not operate as a waiver. Additionally, as Wausau correctly points out, it had no reason at that time to consider, or state in its letter to York, other possible grounds for denying liability, since it was denying York's claim on the ground that no valid bond existed.

We note in passing that we agree with York's contention that there is no inconsistency between the position taken in this action and that taken in other litigation to recover for work performed on the Green Hill Project and that judicial estoppel has no bearing on the issues. York is contending that it had an oral contract with both Eastern and GHA in addition to the written contracts it entered into on October 15, 1987 with GHA.

Alleged oral contract

York seeks payment under two sets of contracts: 1) two written contracts entered into with GHA/Tudor Development Corporation on October 15, 1987 to perform site work at the project; and 2) an alleged oral agreement with GHA and Eastern entered into in August, 1987 to perform repair work and general contractor work on the project on a time and material basis. (Plaintiff's amended complaint, paras. 13-16, 18-21 and 26-28) We address first its claim for payment under the alleged oral contract.

To recover from Wausau, York must establish entitlement to payment under the terms of the payment bond. The payment bond defines a claimant as:

> . . . one having a direct contract with the Principal or with a Subcontractor of the Principal for labor, material or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.

(Plaintiff's amended complaint, exhibit "A"). The "Principal" named in the bond is Eastern. According to plaintiff's allegations in the complaint, the contract work for which York now seeks payment was done pursuant to a contract with GHA to which Eastern was not a party.

To establish that is had an oral contract with Eastern to perform the site work for which it now seeks payment, York must show that: 1) both parties manifested an intention to be bound by the terms of the agreement; 2) the terms of the agreement were sufficiently definite to be specifically enforced; and 3) there was mutuality of consideration. *Redick v. Kraft, Inc.*, 745 F.Supp. 296, 300 (E.D.Pa. 1990) (applying Pennsylvania law). The requirement of consideration is satisfied if there was a benefit conferred on the promisor or a detriment to the promisee and "an act, forbearance or return promise bargained for and given in exchange for the original promise." *Channel Home Centers, Grace Retail v. Grossman*, 795 F.2d 291, 299 (3d Cir. 1986).

"The existence and terms of an oral contract must be established by clear and precise evidence." *Redick, supra*, 745 F.Supp. at 300. Whether a contract exists is a factual issue for the trier of fact to determine unless there is no genuine issue of material fact.

Eastern protests York's reliance on evidence of the facts and circumstances surrounding its work on the project as a violation of the parole evidence rule. The parole evidence rule bars the admission of evidence to vary or alter the forms of an unambiguous written contract. *Project Development Group v. O.H. Materials*, 766 F. Supp. 1348, 1352 (W.D.Pa. 1991). It does not bar the introduction of evidence to prove the existence of an oral contract.

Here, the parties do not disagree on the material facts. They disagree only on the legal conclusions to be drawn from the facts, i.e. the existence or non-existence of an oral contract.

As proof of the existence of a contractual relationship with Eastern, York cites the following facts, all of which are undisputed, except where otherwise indicated:

> 5. From on or about August, 1987 to November, 1987, York claims to have performed certain work on the Green Hill Project on a time and material basis for which claim is made in this civil action.
>
> . . . .
>
> 6. Whenever such time and material work was ordered, York prepared a pre-printed form styled as a "Job Work Order", each of which stated that the work should be billed to "Green Hill Associates".
>
> . . . .
>
> 7. Whenever such time and material work was performed, York prepared an invoice stating that the work had been "SOLD TO" "Green Hill Associates" and mailed that invoice to Green Hill Associates' post office address.
>
> . . . .
>
> 8. On October 15, 1987, York entered into [a] written agreement with "Green Hill Associates/Tudor Development Corporation" to perform certain work in connection with the installation of certain interior roadways on the Green

> Hill Project. . . . [York qualifies this statement by adding, by way of further response: "Eastern . . . participated in the negotiation of the agreement, approved the hiring of York as a subcontractor on the project and treated York as its subcontractor."]
>
> . . . .
>
> 9. On October 15, 1987, York entered into [a] written agreement with "Green Hill Associates/Tudor Development Corporation" to perform certain work in connection with the installation of certain interior parking areas and driveways on the Green Hill Project. . . . [York qualifies this statement by adding, by way of further response: "Eastern . . . participated in the negotiation of the agreement, approved the hiring of York as a subcontractor on the project and treated York as its subcontractor."]
>
> . . . .
>
> 10. Whenever work was performed under either of the October 15, 1987 contracts [between York and Green Hill Associates/Tudor Development Corporation], York prepared an invoice stating that the work had been "SOLD TO" "Green Hill Associates" and mailed that invoice to Green Hill Associates' post office address.

(Record document no. 39, exhibit "F", Wausau's Statement of Undisputed Facts, paras. 5-10, and Record document no. 44. References to supporting documents omitted.)

None of the facts on which York relies establishes the existence of an oral contract with Eastern to perform site work on the project. There is nothing which tends to show mutual assent to enter into a contract. Eastern's presence at negotiations between York and GHA does not establish that it was a party to the contract. Its presence was, in fact, logical and entirely consistent with its role as construction manager/supervisor. GHA hired Eastern as general contractor after Susquehanna departed. Nor does a right of control or supervision over York establish the existence of a contractual obligation. Not every right to control or supervise activities of another gives rise to an inference of a contractual obligation between

the two. If that were so, all supervisors would be deemed to have a contractual obligation to the individuals and entities under their supervision. From the undisputed facts, it is clear that Eastern served as a central clearinghouse for work orders, oversaw the overall project, and coordinated work of the various contractors at the site. See: *Redick*, *supra*, 745 F.Supp. at 300.

Finally, no consideration passed between Eastern and York. While York also contends that it was paid by Eastern for work performed at the Green Hill Project, that contention is not borne out by the facts and documentation submitted.[5] The evidence regarding the manner in which payment was handled, specifically the two checks which passed from Eastern to GHA is ambiguous, at best. Even under the most favorable interpretation to York this evidence does not show that York was paid with funds belonging to Eastern. It shows, at most, that Eastern was sometimes used as an intermediary for funds paid by GHA to York.

The only evidence offered which does tend to show that the parties contemplated that Eastern would be a party to York's contract to perform the site work is irrelevant to the claim that an oral contract existed. In an affidavit filed by York, John W. Meyers, a stockholder in CMC, states, *inter alia*, that: 1) GHA instructed him to negotiate an agreement with York for the excavation work and told him to include Eastern as a signatory on the written contract; 2) Eastern approved York's hiring; and 3) the intention was that Eastern would be a party and signatory to York's contract with GHA, and this did not come about due to "an administrative oversight". [sic]

The difficulty with this evidence is that Meyers' statements do not relate to the claim we understand York to be asserting in this action—i.e. a claim for recovery under a purported oral contract with both Eastern and GHA, separate and apart from the written contracts entered into with Eastern alone on October 15, 1987.

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5. See Record document no. 46, exhibits 2 and 3.

Non-party to written contracts

York's attempted recovery against Wausau for work performed under the two written contracts is barred by the fact that Eastern is not a party to either contract. None of the evidence proffered establishes that it was in fact a party to either or raises a genuine issue of material fact on that question.

The parole evidence does apply to this issue, to bar the admission of any evidence offered to vary or alter the terms of York's written contracts with GHA, which is precisely the intended effect of Meyers' affidavit statements to the effect that the failure to make Eastern a signatory was an administrative oversight.

Alleged reliance

Finally, York's reliance on the production of the payment bond in response to its request for assurance of payment does not bear on any element necessary to prove the existence of a contract. Nor can such reliance be the basis for any right of recovery against Wausau. Either GHA or Eastern provided York with the bond as assurance of payment. Neither had any authority from Wausau, either actual or apparent, to act as its agent in altering or expanding the terms of the payment bond. Hence, neither had the capacity to change or extend any obligation owed by Wausau under the terms of the bond.

Wausau's indemnification claims against third party defendants

Grant of judgment in favor of Wausau on York's claims under the bond renders moot Wausau's claims for indemnification against third party defendants for any loss it may suffer under the alleged bond. Judgment will, therefore be entered in favor of the third party defendants Eastern; Mid-Atlantic; Eastern Excavating; John L. Daddona, Sr.; Judy A. Daddona; Eva Daddona; GHA; Tudor; Sidney J. Cohen; Dorothy Cohen; and Marc Cohen, on Counts I, II and V of Wausau's third party complaint.

/s/ JAMES F. MC CLURE, JR.
James F. McClure, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

YORK EXCAVATING COMPANY, INC., Plaintiff	:	
	:	NO. CV-91-1037
v.	:	(McClure)
EMPLOYERS INSURANCE OF WAUSAU, Defendant	:	

ORDER #1

October 21, 1993

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT:

1. The motion for summary judgment filed by Employers Insurance of Wausau (Wausau), (Record Document No. 37) and joined in by third party defendants Culnen and Culnen & Hamilton (Record Document No. 43) is granted in part and denied in part.

2. Judgment is granted in favor of Wausau and against plaintiff York Excavating Company, Inc. (York) on York's claims for payment under the bond. York's claims of fraudulent representation against Wausau remain.

3. The foregoing grant of judgment in favor of Wausau renders moot Wausau's claims for indemnification against the third party defendants for any loss it may suffer under the alleged bond.

4. The motion for summary judgment (Record Document No. 40) filed by Eastern Consolidated Utilities, Inc. (Eastern) and other third party defendants is denied as moot.

5. All third party claims asserted by Wausau against the following third party defendants: Eastern; Mid-Atlantic Pipeline, Inc.; Eastern Excavating, Inc.; John L. Daddona, Sr.; Judy

A. Daddona; Eva Daddona; Green Hill Associates; Tudor Development Group, Inc.; Sidney J. Cohen; Dorothy Cohen; and Marc Cohen, in Counts I, II and V are dismissed as moot.

6. York's claims against Wausau for fraudulent misrepresentation and Wausau's indemnification claims against Culnen and Culnen & Hamilton remain.

7. A revised scheduling order will follow.

/s/ JAMES F. MC CLURE, JR.

James F. McClure, Jr.
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I today served three (3) copies of the foregoing paper upon all counsel and upon the Solicitor General of the United States, by mailing said copies via first class mail, postage prepaid, to the following:

Solicitor General
Department of Justice
Washington, DC 20530

Kim Daniel, Esquire
Assistant United States Attorney
United States Courthouse
228 Walnut Street
Harrisburg, PA 17108

James G. Wiles

DATED: October 13, 1994